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HEARING

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In the Matter of:

Adjustment of the Rates for
Noncommercial Educational
Broadcasting Compulsory
License

Docket No. 96-6
CARP NCBRA

Library of Congress
James Madison Building
101 Independence Avenue, S.E.
Room LM414
Washington, D.C. 20540

Thursday,
March 12, 1998

The above-entitled matter came on for
hearing, pursuant to notice, at 10:00 a.m.

BEFORE:

THE HONORABLE LEWIS HALL GRIFFITH, Chairperson
THE HONORABLE EDWARD DREYFUS
THE HONORABLE JEFFREY S. GULIN

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I-N-D-E-X

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11X	Ledbetter Excerpt	630	
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13X	Web Page Excerpt	661	661
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P-R-O-C-E-E-D-I-N-G-S

(9:58 a.m.)

CHAIRPERSON GRIFFITH: All right, let the record reflect please, that the court reporter has been previously sworn and remains under oath. Good morning, ladies and gentleman.

ALL: Good morning.

CHAIRPERSON GRIFFITH: Let me just run through a couple of things here that we have discussed and I made a note of during the past couple of days. As I recall, we are waiting with great anticipation to hear about your extensive discussions concerning the Boyle matter.

We are also waiting for a stipulation regarding the effective date of our decision which you're going to provide with us. We are still awaiting some decision with respect to rescheduling April 3rd, 27th, and 30th. We understand that by the 16th you will provide us perhaps some letter form information with respect to Exhibits PB7X, and 8X, and Mr. Rich, I think you were going to provide us a substitute for PB10X?

1 MR. RICH: Yes, we have that this morning.

2 CHAIRPERSON GRIFFITH: You have that? If
3 you'll give them to the court reporter, please.

4 MR. WEISS: And I also have a copy of PB
5 Exhibit 5X that we discussed.

6 CHAIRPERSON GRIFFITH: That's the next
7 thing, and we're a bit confused. Has 5X been admitted
8 or not?

9 MR. WEISS: I believe it was, without
10 objection.

11 MR. SCHAEFFER: There's no objection to it
12 at the present.

13 CHAIRPERSON GRIFFITH: Then it is
14 admitted.

15 (Whereupon, the document marked
16 as PB5X was admitted into
17 evidence.)

18 MR. WEISS: The decision is 5X.

19 CHAIRPERSON GRIFFITH: Any comments with
20 respect to discussions concerning the Boyle matter?

21 MR. SCHAEFFER: Your Honor, I'd like my
22 colleague Mr. Shore to handle our part, so if you

1 could step forward.

2 CHAIRPERSON GRIFFITH: All right.

3 MR. RICH: It might be useful to spend a
4 few minutes -- I don't think either side is eager to
5 bring in witnesses for Friday but it might be
6 appropriate to spend a few minutes if our colleagues
7 are willing, discussing where we seem to be, and maybe
8 there's a decision we could work out if we could
9 burden the panel for a few minutes. Maybe you'll have
10 some wisdom on this.

11 Let me try to summarize where we see the
12 issues at this point, if I may. I believe we are at
13 the point of agreement that the data which was most
14 recently supplied us does not support an underlying
15 aspect of the Peter Boyle direct testimony as it now
16 exists.

17 That is, that the data which was supplied
18 our clients most recently, on or about February 23rd,
19 dealing with -- to keep it simple -- music use on
20 public television, when analyzed did not match up
21 according to our expert analysis, in our totality and
22 substance with the underlying data which we understood

1 formed the basis for Dr. Boyle's comparative analysis
2 from which, in the recently amended ASCAP case, a
3 music use ratio was established at about 37 percent
4 more music use on public television.

5 As of yesterday, based on our discussions
6 with White & Case, I believe we now have an
7 acknowledgement from the other side that in fact, the
8 data produced on February 23rd is a different subset
9 of data, in fact, than the data on which that 37
10 percent analysis was generated -- which had been our
11 supposition all along and which had been a major basis
12 of complaint on our end; namely, how can we test the
13 37 percent proposition against data which appears to
14 be apples and oranges.

15 Finally, yesterday, if I'm not mistaken,
16 we now have agreement and acknowledgement from White
17 & Case that in fact, the data are different.

18 Now, I believe it would probably -- I'll
19 let White & Case speak to this -- be White & Case's
20 view that at some point Dr. Boyle would like to amend
21 his testimony to conform it to the new data so that
22 some new ratio -- one we don't yet know -- will be

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1 generated.

2 That poses a series of further dilemmas
3 for us as we think about it at this point.

4 JUDGE DREYFUS: Well, before you go off on
5 that direction, I think it's important for us to hear
6 from White & Case on that point.

7 MR. RICH: Please. Please.

8 MR. SHORE: With respect -- we can come
9 back to whether the data matches. As I read the
10 ruling, as we read the ruling, the issue is whether
11 they got the data in readable form. It has been
12 conceded now that they can read all of the data.

13 JUDGE DREYFUS: That's a bit too narrow.
14 Excuse me for interrupting.

15 MR. SHORE: Sure.

16 JUDGE DREYFUS: But the question is
17 whether or not you submitted the data and that data --
18 forget the timeliness for a moment -- but whether or
19 not that data complied with the previous order.

20 MR. SHORE: Yes. The data they have been
21 able to reproduce, the pay files, from the data which
22 was submitted on the 23rd, the corrected data.

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1 JUDGE GULIN: Is this a different subset
2 of data than the data that was used to support the
3 analysis by Dr. Boyle?

4 MR. SHORE: With respect to only the
5 Public Broadcaster's pay file, which is one subset --
6 if you recall the chart we submitted on our opposition
7 to the motion -- there's one subset of the overall
8 data that has been produced. That data is off,
9 perhaps -- Pavlos told me around four percent. So
10 it's a matter of degree --

11 JUDGE GULIN: But I think then, you have
12 to concede that the order has not been complied with.

13 MR. SHORE: I'm not following.

14 JUDGE DREYFUS: What I'm saying is, you
15 were ordered to turn over the data which underlies the
16 analysis Dr. Boyle performed. If that --

17 MR. SHORE: And that's exactly what --

18 JUDGE GULIN: Well, you're saying that
19 data has not been turned over. At least not 100
20 percent of it.

21 MR. SCHAEFFER: No, no, no. What they're
22 saying is the data shows that Boyle was off by four

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1 percent. The data has all been produced. What Mr.
2 Rich is saying, for example, is that the consequence
3 now, of reading the data, it looks like there's a
4 problem of Boyle's estimate by four percent; not that
5 they didn't -- you have to understand, Boyle's
6 testimony was based on summaries of data. It said so.

7 JUDGE GULIN: I understand that.

8 MR. SCHAEFFER: This is the underlying
9 material.

10 JUDGE GULIN: Then you agree then, that
11 Dr. Boyle must amend his testimony?

12 MR. SCHAEFFER: No, because it's in favor
13 of PBS, so I'm not sure I want to amend that -- I'm
14 not sure that that degree of precision is necessary
15 for your deliberation, to be perfectly honest. That's
16 something we haven't really decided. The amount from
17 our point of view is de minimis.

18 MR. SHORE: Tens of thousands of dollars.

19 MR. SCHAEFFER: It's not enough for us to
20 burden you with any further -- the general consensus
21 at the moment may -- but I think that's our general
22 consensus; it's de minimis.

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1 CHAIRPERSON GRIFFITH: Okay.

2 JUDGE DREYFUS: Just so I understand. The
3 four percent you're talking about is off the 37
4 percent? Which percent are we talking about?

5 MR. SHORE: Yes, the 37 --

6 JUDGE DREYFUS: Four percent of what?

7 MR. SHORE: Public Broadcasting, the
8 underlying data which is now generating the summaries
9 -- regenerating the summaries that Dr. Boyle relied
10 upon -- is showing four percent more music on public
11 television than on analog commercial stations.

12 MR. SCHAEFFER: So it would be 41 percent.

13 JUDGE DREYFUS: So it would be 41 percent.

14 MR. SCHAEFFER: And it's not enough for us
15 to make a big deal about it.

16 JUDGE DREYFUS: So you would stay with the
17 testimony of 37 percent?

18 MR. SCHAEFFER: Yes, I'm pretty -- in
19 fact, that is -- the answer is yes. It's not worth
20 fighting about. And there's no doubt that on cross
21 examination they can question Boyle to their heart's
22 content about why the discrepancy took place. I mean,

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1 even why the amendment took place recently.

2 And I think Boyle will show that he
3 actually used -- which I don't think there's ever been
4 any secret about -- are the summaries of the data.
5 What we're talking about now about the underlying
6 material, and I think we've gone through this in --

7 JUDGE GULIN: Okay. Then Mr. Rich, it
8 appears then, that there's some disagreement as to the
9 significance of the data, as to whether it's truly
10 materially different or not. You, I take it, feel it
11 is. Isn't then, just a matter of cross examination?

12 MR. RICH: To some degree, yes; to some
13 degree, no. To the extent that Dr. Boyle testified
14 that a 37 percent adjustment is appropriate, he has
15 yet, as required by the discovery rules, to produce
16 data which supported -- ever -- his proposition.

17 Now, one could say well, he produced the
18 data and it doesn't match and that's just fodder for
19 cross examination and that will go to the reliability,
20 perhaps, of his testimony here.

21 But we still have no idea, frankly, from
22 the bizarre process and labyrinthine process we've

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1 been through getting round after round of data that
2 never is what it was represented to be, what really
3 Peter Boyle ever relied on. I don't know today still,
4 listening to my colleagues across the table, that
5 they're prepared to represent -- and if they are I'd
6 like to hear it.

7 But the data we were finally produced on
8 February 23rd was in fact, the data on which Mr. Boyle
9 relied for his 37 percent computation. I've not heard
10 that. If that's the case that would advance this
11 inquiry measurably.

12 CHAIRPERSON GRIFFITH: Do you want to
13 respond to that?

14 MR. SHORE: Yes. Dr. Boyle based his
15 summaries upon the database. What has been drawn out
16 of that database are the very data which Dr. Boyle
17 erroneously summarized to the tune of four percent,
18 with respect to one of the five media in one of the
19 five categories of data produced.

20 MR. RICH: Now, our suggestion yesterday
21 to advance this was not to -- in fact, we were
22 prepared to go further than even what ASCAP was

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1 suggesting. Our proposal yesterday -- and I hope you
2 don't mind my advising the panel -- was that we would
3 not even object if they wished to further amend one
4 more time, to conform Dr. Boyle's testimony to the
5 data, even if it cuts "the wrong way" from our
6 client's standpoint.

7 We said, if you want to do that we have no
8 objection. We asked for two things in return, which
9 we thought were eminently reasonable in light of the
10 entirety of this exercise that we've been put through.

11 The first was that they agreed not to put
12 Dr. Boyle on the stand to testify as to the data --
13 whichever data, frankly -- that he was right or that
14 he was wrong, until the rebuttal phase of the case,
15 for one simple reason.

16 Only as of last night, now that we know
17 "the facts", is our expert in a position to begin to
18 look at the data and do what we wanted to do to
19 understand and to be prepared to cross examine it,
20 since October 1st when the case went in.

21 And so our suggestion had been -- and we
22 would urge it to be the right suggestion -- that Dr.

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1 Boyle appear on schedule next week, to testify as to
2 his position and his testimony on every aspect of the
3 case save one; which is the information that just
4 yesterday we now understand what it's about.

5 And as to that one piece of his case, the
6 music element, that we would agree and we would ask
7 the panel to order, that testimony be held as to that
8 to provide us with, in the circumstances minimal, but
9 ample time to do the proper examination of that data
10 that's millions of pieces of data that links up to
11 other complex databases -- QC databases, so-called
12 header files, etc.

13 None of that's been done. We've spent our
14 entire energy trying to get to the answer we just
15 learned last night. And that that part of the case go
16 on affirmatively from Dr. Boyle during rebuttal
17 sometimes in April; that we at that moment having had
18 proper time and hopefully adequate time to analyze it
19 and run our own databases against it, cross examine
20 it.

21 And secondly -- and we feel very strongly
22 about this -- that the expert time that we now

1 concededly, utterly wasted trying to get to the answer
2 we just heard for the first time yesterday -- the
3 \$22,000 in total wasted time -- be reimbursed to our
4 client.

5 We don't object, even as I said, to an
6 amended case on those circumstances, but the prejudice
7 to our client has been twofold: we've not begun to
8 analyze the significance of the data -- we haven't had
9 a chance to; and our client has been chasing its tail
10 at enormous expense -- and I'm not even citing the
11 attorney time involved, I'm not asking for that here
12 -- but strictly the out-of-pocket expense to expert
13 witnesses incurred.

14 That was the proposal we made yesterday
15 afternoon when we finally learned the bottom line as
16 to what the data are, but White & Case had found that
17 proposal unacceptable.

18 CHAIRPERSON GRIFFITH: Okay. Mr. Shore.

19 MR. SHORE: This --

20 JUDGE DREYFUS: Before you start and
21 before you reply to that, you haven't mentioned the
22 difference in media, or medium that you received --

1 MR. RICH: I'm happy to. It took us three
2 days -- I'm glad you raised it. It was the first time
3 the data were produced in -- what form?

4 MR. STEIN: Ditto tape player.

5 MR. RICH: We had to go buy new equipment
6 because it was the first time it was produced in that
7 form; that is, our experts had to purchase new
8 equipment and it took them three full days to get it
9 and now we can read it. But it was just another
10 example of extraordinary waste of time and energy to
11 get to understanding what was going on here.

12 But the technical answer to your question
13 is, we can now read it.

14 JUDGE GULIN: And what are the total costs
15 that you're requesting?

16 MR. RICH: It's \$22,000 and change,
17 supported in the declaration that we submitted from
18 our --

19 JUDGE GULIN: And you're not supplementing
20 that?

21 MR. RICH: Pardon me?

22 JUDGE GULIN: You're not supplementing

1 that?

2 MR. RICH: We could; I'm not asking for
3 it.

4 JUDGE GULIN: All right. So whatever's in
5 your --

6 MR. RICH: That's correct.

7 MR. SHORE: Just a short response on why
8 we don't think the proposal's acceptable. When this
9 data was produced on February 23rd when I got involved
10 in this process, I offered to have Mr. Mourdoukoutas
11 at the Public Broadcaster's beck-and-call to come, sit
12 down with them, and walk through this data with them
13 and answer any questions they had.

14 The first time I received a question from
15 Public Broadcaster's as to why this data matched,
16 whether it matched, whether it didn't match, was last
17 night -- or one day ago from Mr. Weiss -- and I
18 responded within 12 hours to answer that question.

19 This data, now that they have it in
20 readable form, can be produced and reproduced in the
21 summaries if they'd sit down with Mr. Mourdoukoutas
22 within three days. Mr. Mourdoukoutas has in fact,

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1 gone back through and checked exactly what their
2 findings have confirmed; that this data is leading to
3 that slight change in public broadcasting.

4 They could do it now if they sat down --
5 their expert sat down with Mr. Mourdoukoutas -- they
6 could redo this data and have it ready to see whether
7 it matched up; which of course was the whole purpose
8 of asking the data to verify what went on. They could
9 do that before Dr. Boyle testifies next week.

10 What we've suggested is to accommodate
11 them any way we can -- either put Dr. Boyle on to
12 testify and then, rather than calling him back on
13 rebuttal, allow them to cross them whenever they want
14 -- or to put Dr. Boyle on in the first instance during
15 the week of March 30th, which is the last week of the
16 direct cases.

17 And that's way they'll certainly -- if
18 they'd just sit down with Pavlos Mourdoukoutas he can
19 walk them through this; which is certainly more than
20 they're entitled to under the Federal Rules. They
21 don't have a deposition in this case but we're willing
22 to give them what is in essence, a 3-day sit-down or

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1 however long it takes, to do this data and get it done
2 correctly.

3 MR. SHORE: I'd like just to add
4 something. This process, in order to probe the
5 equities and inequities of what's been happening in
6 this procedure -- because we've spent enormous amounts
7 of money ourselves on this -- it would require a
8 hearing.

9 Because I do not accept much of what Mr.
10 Rich says about who is wrong and who is right and what
11 machinery they were using, whether they were using the
12 right equipment. As I understand, it's a couple of
13 hundred bucks if you purchase equipment and I don't
14 know that it's our responsibility in the first place.

15 One mistake that apparently was made of
16 great significance going back, was what -- you know,
17 our answering papers was described essentially as a
18 copying mistake, and we explained that I think.

19 We started out this proceeding as saying
20 we would put Boyle on on March 30th from the get-go,
21 at the conclusion of BMI's case, offering them Pavlos,
22 anything they wanted in order to accommodate. To be

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1 honest with you, I think this stuff is a tempest in a
2 teapot because in the end it's not going to make any
3 difference in terms of what your decision's going to
4 be.

5 But that's for you to decide and they have
6 every right in the world to cross examine to their
7 heart's content. But it seems to me, if they want to,
8 we'll put Boyle on next week. They can have as much
9 time as they want to cross examine as allowed by you.

10 I don't see how they're harmed at that.
11 The practical truth of the matter is, they probably
12 will just -- they can do some of the cross examination
13 next week and if they want to come back for a second
14 time that's fine with me, also.

15 So then we would have the advantage, it
16 seems to me, that if they think they haven't been able
17 to -- they'll have the equivalent of a deposition with
18 Boyle which is more than they're entitled to anyway,
19 and then Boyle can come back later on if they feel the
20 need.

21 My expectation is that if we get Boyle on
22 next week, they cross examine him to the extent that

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1 they want to, they probably won't call him back again
2 anyway and we can move on.

3 CHAIRPERSON GRIFFITH: Mr. Schaeffer, my
4 concern is, in your discussions have you considered
5 your various exposures? This material was supposed to
6 be produced in January and you are exposed to the
7 possibility of the panel granting their motion to
8 strike portions of the testimony of Dr. Boyle, and so
9 you --

10 MR. SCHAEFFER: We have --

11 CHAIRPERSON GRIFFITH: -- get to use it.
12 And you, Mr. Rich as well, are exposed to the
13 possibility of us accepting their position completely
14 and going right ahead right now.

15 MR. SCHAEFFER: That's why --

16 MR. RICH: Your Honor, that's why I made
17 what I thought was a reasonable --

18 MR. SCHAEFFER: Well, my counter -- I'm
19 sorry.

20 MR. RICH: It is physically impossible for
21 me to conduct a meaningful cross examination next week
22 of Dr. Boyle on this data. Any expert worth his salt

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1 looking at the magnitude of the data produced would so
2 testify. It astonishes me --

3 JUDGE DREYFUS: But you can reserve cross.
4 I thought that the proposal was to reserve --

5 MR. SCHAEFFER: Yes, absolutely, sure.

6 MR. RICH: He's saying start it on these
7 issues.

8 MR. SCHAEFFER: No.

9 JUDGE DREYFUS: You don't have to start it
10 --

11 MR. SCHAEFFER: If you don't want to.

12 JUDGE DREYFUS: -- if you don't want to.

13 MR. RICH: That's my proposal, is that we
14 --

15 MR. SCHAEFFER: Well, do it on direct so
16 I'll be finished with -- the direct is just as
17 important, anyway, as a substantial matter, and then
18 they can come back and pick a date that they want to
19 cross him. I don't have any problem with that. And
20 if they don't want to cross him at all next week,
21 fine. Whatever they want to do. If they want to
22 cross him or whatever they want.

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1 JUDGE GULIN: You want to conduct the
2 entire direct?

3 MR. SCHAEFFER: I want to finish the
4 direct next week and then they can cross him -- and I
5 think -- there's much ado -- the direct is already
6 there.

7 MR. RICH: If I may say one thing about
8 this much ado about nothing. They would take a number
9 which they claim is a proper fee for their client, and
10 inflate it by 40 percent over what Mr. Schaeffer
11 trivializes is a non-event in this case.

12 MR. SCHAEFFER: You've got the number
13 switched around --

14 MR. RICH: A 40 percent inflator on the
15 base fee ASCAP wants in its case and he's blowing it
16 off as it it's a trivial sum of money. This is a
17 huge, multi-million-dollar issue driving their free
18 proposal.

19 MR. SCHAEFFER: I don't agree with that,
20 but we understand --

21 MR. RICH: You can withdraw it.

22 JUDGE DREYFUS: If we understand -- I

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1 thought Boyle was a key witness --

2 MR. SCHAEFFER: He is key.

3 JUDGE DREYFUS: -- for your case. That's
4 all we need to know. But I don't understand your
5 position. If they're willing to let you cross anytime
6 in the future that give your experts time to prepare
7 --

8 MR. RICH: If --

9 JUDGE DREYFUS: -- and lawyers to prepare
10 for that cross.

11 MR. RICH: If Your Honors, you're
12 amenable, in the spirit of that, not to saying do it
13 by March 30th, which is I don't believe, time enough.
14 But if that includes our ability to recall on the
15 rebuttal phase of this case, Dr. Boyle, to perform the
16 cross examination on the music data, it's entirely
17 acceptable but I would press, as a condition of
18 withdrawing my motion, a cost portion of the motion in
19 light of the incredible record I think, that underlies
20 what's --

21 MR. SCHAEFFER: My response to that is,
22 \$26,000 is a considerable amount of money in costs.

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1 In Federal Court I think there'd be a serious question
2 whether this can be done. We don't agree with a lot
3 of the things they say and the costs in our view are
4 totally inflated.

5 But it seems to me a waste of everybody's
6 time to have a hearing on that subject. We don't
7 agree with the \$22,000. It's not fair to just assess
8 it against us. What it seems to me to be a more
9 practical thing, in the end you're going to have to
10 make an evaluation of what ASCAP and BMI are going to
11 get.

12 After you've heard Boyle and after you've
13 heard the cross examination, if you want to take
14 something like that into consideration, fine. But why
15 not just go ahead and we'll worry about that later on?
16 It seems to me, let's hear the testimony and go ahead
17 on that basis.

18 Incidentally, we are going to do this and
19 I've got to be excused for a few minutes because I've
20 got a telephone call to make because I want to bring
21 some witnesses in tomorrow afternoon so we can finish
22 up our case.

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1 JUDGE GULIN: Well, I guess in answer to
2 your question, the only reason why not is because we
3 can resolve the matter, apparently. If you're willing
4 to pay them some costs --

5 MR. SCHAEFFER: Well, I don't think the
6 costs are justified, and I really don't.

7 JUDGE GULIN: Well, do you think a meeting
8 with them to discuss the costs and if you feel that it
9 should be some lesser amount, make them an offer?
10 Would that be a worthwhile exercise?

11 MR. SCHAEFFER: I think it's just going to
12 waste -- it seems to me after you've heard the
13 testimony if you want to reduce the amount that
14 ASCAP's going to get over the next five years by
15 \$20,000 by whatever you want, fine. That will be up
16 to you. And it seems to be a more practical way to
17 go.

18 CHAIRPERSON GRIFFITH: What authority do
19 we have to do that, other than your agreeing to it --

20 MR. SCHAEFFER: Well, I'm agreeing to it.
21 I'm authorized on behalf of ASCAP.

22 JUDGE DREYFUS: The board to award costs?

1 MR. SCHAEFFER: Well, I don't think
2 there's anything in the rules that allows you to award
3 costs, which is another aspect --

4 JUDGE DREYFUS: Where do we find that
5 authority?

6 MR. SCHAEFFER: That's why I think my
7 suggestion is much more pragmatic. If you want to
8 make an adjustment --

9 JUDGE GULIN: Well, whether we have the
10 authority or not if it's in the nature of a settlement
11 to resolve this matter, obviously it can be done.

12 MR. SCHAEFFER: My proposal --

13 JUDGE GULIN: And we certainly would have
14 the authority to adjust costs at the end of the
15 proceeding.

16 MR. SCHAEFFER: My proposal is, after
17 we've had the testimony and after you've had the
18 proceeding, this paper is in front of you -- let me
19 look at it, maybe I'll want to make a comment or two
20 because I don't know if we have it or haven't, I don't
21 really remember. But we can take care of that at the
22 end of the day.

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1 JUDGE GULIN: All right. Well, it's
2 really not a matter that's up to the panel. We're
3 exploring settlement now. If the parties can agree,
4 we can simply proceed in that matter. But --

5 MR. SCHAEFFER: Yes, I mean --

6 JUDGE GULIN: -- the other case is, we're
7 going to have to go to a hearing and then we'll issue
8 a decision.

9 MR. SCHAEFFER: Yes, Ms. McGivern reminds
10 me, there was some requests that were made of us that
11 were crazy, and we must have spent -- she's said and
12 I don't know -- 50-, 60-, 70-, 80-, maybe 100,000
13 dollars on that. And I really don't want to get into
14 that.

15 You'll hear all the testimony from Boyle
16 and you'll see if he screwed up or didn't screw it up.
17 And that will give you a feeling for the thing.
18 There's no reason why -- and Bruce, why don't we just
19 do it that way?

20 MR. RICH: Because it let's you off the
21 hook scott-free, quite frankly. I mean, we have a
22 Motion to Strike pending, which I think would properly

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1 be the remedy for the outrageous history that's gone
2 on here.

3 I've gone, I think, three-quarters of the
4 way by saying, well we'll let you amend your case.
5 And I think our request quite frankly, is more than
6 reasonable saying, well having been put to the burden
7 of ASCAP's errors here, our client shouldn't pay the
8 economic --

9 MR. SCHAEFFER: If we don't amend our
10 case, would you accept my proposal? Then you'd get a
11 much better offer.

12 MR. RICH: Might we adjourn for five
13 minutes for me to talk to Mr. Schaeffer privately?

14 CHAIRPERSON GRIFFITH: All right.

15 MR. RICH: I'm just trying to suggest that
16 it would be nice --

17 CHAIRPERSON GRIFFITH: No, I mean, we can
18 save on a whole afternoon here if --

19 MR. SCHAEFFER: If I can do it, and bring
20 in the two witnesses and we'll be done on Friday.
21 Acceptable?

22 CHAIRPERSON GRIFFITH: Sure.

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1 JUDGE DREYFUS: Why don't we appear ready
2 to go with Mr. Ledbetter after this conference?

3 MR. SCHAEFFER: Yes, he's sitting right --

4 CHAIRPERSON GRIFFITH: Mr. Rich and Mr.
5 Schaeffer? I deal in ten minute intervals. Okay,
6 10:30.

7 (Whereupon, the foregoing matter went off
8 the record at 10:23 a.m. and went back on back on the
9 record at 10:33 a.m.)

10 MR. SCHAEFFER: I'm pleased to report I
11 think we've reached a meeting of the minds. And let
12 me say my understanding of it and I think it's the
13 same as Mr. Rich's; if it isn't I'm sure he will speak
14 out.

15 We've agreed that Dr. Boyle will testify
16 as scheduled; that Mr. Rich will be -- I shouldn't say
17 Mr. Rich -- the Public Broadcasters will be free to
18 cross examine him as they see fit.

19 On that day they have the right, up until
20 the conclusion of rebuttal, to cross examine him on
21 the material -- the changes, I guess -- and frankly,
22 I take a liberal view on what they can cross examine

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1 him about again, because it's going to be very hard to
2 cut the egg yolk.

3 That we will privately work out between us
4 the question of costs and we'll resolve it as
5 gentlemen and lawyers privately at the appropriate
6 time. That we will make the amendment in the
7 proposal, and Dr. Boyle will try and get the detail
8 back to Mr. Rich by Monday.

9 But in any event, he can cross examine him
10 about that whenever the -- on the two occasions he
11 chooses to cross examine.

12 The only thing I didn't say, Bruce, I
13 think it shouldn't be more than two cross
14 examinations. It should be -- and I don't think you'd
15 want to do that -- so he can cross examine him next
16 week to the extent he wants to and then he'll have one
17 more shot at the apple for rebuttal.

18 Is that a fair description?

19 MR. RICH: That is a fair and complete
20 description. And on that basis we're prepared to
21 withdraw our Motion to Strike Dr. Boyle's testimony
22 and to free up Friday afternoon for hopefully, pushing

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1 through as much of the rest of ASCAP's case as --

2 MR. SCHAEFFER: I have -- just so the
3 arbitrators know --

4 CHAIRPERSON GRIFFITH: Wait just one
5 minute. Let the record reflect that in view of the
6 agreement of the parties -- that being Public
7 Broadcasters and ASCAP -- that Mr. Rich on behalf of
8 Public Broadcasters is withdrawing his Motion to
9 Strike certain portions of the testimony of Dr. Boyle.
10 That motion is granted.

11 All right. Now.

12 MR. SCHAEFFER: Then I have to schedule it
13 just because I need a little help from --

14 JUDGE GULIN: Before you --

15 MR. SCHAEFFER: -- and BMI.

16 CHAIRPERSON GRIFFITH: Mr. Kleinberg, do
17 you have any comments you want to make concerning
18 that, or not?

19 DR. KLEINBERG: Our comments would only be
20 that we do not anticipate any of this affecting us in
21 terms of Dr. Boyle. If that circumstance were to
22 change, however, we would reserve the right to conduct

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1 whatever examination was appropriate in the context of
2 what has changed.

3 CHAIRPERSON GRIFFITH: Well, you have that
4 right anyway.

5 DR. KLEINBERG: I assumed that to be the
6 case, but I have sat silently because this has not
7 affected us directly, but if that situation were to
8 change in some unforeseen way --

9 JUDGE DREYFUS: Let me understand what I
10 think you're saying. Are you asking also for right to
11 cross examine at the time Public Broadcasters cross
12 examine? During the rebuttal case?

13 DR. KLEINBERG: If that were appropriate,
14 given the nature of the testimony that was elicited.
15 I do not anticipate or expect that to be the case, but
16 I don't know what's going to happen. So I guess I'd
17 say I'd reserve that in the unlikely, unforeseeable
18 situation if the circumstances change. I don't see
19 that happening.

20 JUDGE GULIN: So Mr. Rich and Mr.
21 Schaeffer, do you envisage, when you do your second
22 cross examination, that there will be an opportunity

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1 for redirect?

2 MR. RICH: Yes. My view of it, anyway,
3 would be, my full intention is next week to cross
4 examine Dr. Boyle fully on all other aspects of his
5 testimony, and in all likelihood, not return to those.
6 Even though I appreciate Mr. Schaeffer's remarks.

7 My further examination during what I
8 anticipate would be the rebuttal period, would be
9 limited to this issue; namely the music data. And i
10 would assume as to that portion, Mr. Schaeffer would
11 be free to redirect. And of course, BMI to do as it
12 wishes.

13 MR. SCHAEFFER: Yes, that was my
14 understanding. To be honest with you, I'm hopeful,
15 I'm optimistic -- it may not happen that way, that Mr.
16 Rich may say he doesn't have to bother with another --

17 JUDGE GULIN: May I ask one of you
18 gentlemen to submit a written statement that you're
19 withdrawing the --

20 MR. SCHAEFFER: Yes, why don't we try and
21 do a stipulation so we both can dot the "i's" and
22 cross the "t's"? Then I wanted to talk about schedule

1 in a little bit.

2 CHAIRPERSON GRIFFITH: Okay, before you
3 get to that, can you do that by the close of business
4 on Monday, the 16th, with the other stipulation?

5 MR. SCHAEFFER: Yes, I certainly --

6 CHAIRPERSON GRIFFITH: Mr. Rich?

7 MR. RICH: Yes.

8 MR. SCHAEFFER: -- I'm look to Ms.
9 McGivern who's the distributor of these things, but
10 yes, we'll try to.

11 CHAIRPERSON GRIFFITH: All right. Thank
12 you.

13 MR. SCHAEFFER: I have planned -- I'm
14 hopeful tomorrow -- today the program is, as I think
15 the arbitrators know, we're going to put Mr. Ledbetter
16 on, then we intend to put Mr. Saltzman on, then we
17 intend to put -- what's his name, Bergstein? -- Dr.
18 Bergstein on and Ms. Grajeda on. And we should be
19 able to do that, I think, within the parameters of the
20 day.

21 Tomorrow in the morning, we intend and we
22 will put on Mr. Unmacht and Mr. Day. I'm hopeful that

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1 now I'm trying to get Ms. Iossa and Mr. Anderson to
2 come in and that would finish up the afternoon.

3 I think at this point in time there are
4 two other witnesses who we put very perfunctory --
5 there's very perfunctory testimony with both Schwind
6 and Bander. I don't think it's necessary for us --
7 and I would withdraw the testimony because I think
8 actually, when the direct case came in from Public
9 Broadcasters, the materials that they attested to are
10 conceded by them. It's really station numbers and
11 things of that sort.

12 So rather than burden the arbitrators with
13 testimony, since it's in essence an admission, unless
14 Mr. Rich has some objection -- to which case I will
15 produce either of them -- my intention would be not to
16 put either -- to withdraw that testimony as irrelevant
17 or redundant.

18 But obviously, he may have -- and BMI may
19 have --

20 MR. RICH: We have no objection to the
21 withdrawal of the testimony, and by definition the
22 underlying data and information it proposed to

1 sponsor.

2 MR. SCHAEFFER: That would be my
3 intention.

4 CHAIRPERSON GRIFFITH: All right. Thank
5 you. All right, are you ready to start?

6 MR. SCHAEFFER: Mr. Ledbetter is our
7 witness.

8 JUDGE GULIN: Let me just ask one further
9 matter. PB10X was not admitted, is that correct?

10 MR. SCHAEFFER: Is that the brief?

11 JUDGE GULIN: That's the brief.

12 MR. SCHAEFFER: No, I think I consented to
13 its admission.

14 JUDGE GULIN: That's fine.

15 JUDGE GULIN: That's also --

16 MR. SCHAEFFER: Yes, 5X we have no
17 objection to.

18 (Whereupon, the document marked
19 as PB10X was admitted into
20 evidence.)

21 CHAIRPERSON GRIFFITH: Right. Mr.
22 Ledbetter, please.

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1 Good morning. Would you just have a seat
2 please, sir? Mr. Ledbetter, would you raise your
3 right hand to be sworn?

4 WHEREUPON,

5 JAMES LEDBETTER

6 was called as a witness by Counsel for ASCAP and,
7 having been first duly sworn, assumed the witness
8 stand, was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. SCHAEFFER:

11 Q Mr. Ledbetter, would you state your
12 residence address, please?

13 A I'm sorry?

14 Q State your address.

15 A My address?

16 Q Yes.

17 A It's 423 Hicks Street, H-I-C-K-S,
18 Apartment 2-F, Brooklyn, New York 11201.

19 Q Would you tell us very briefly, the
20 history of your involvement as an observer and writer
21 of articles and works concerning public broadcasting
22 in the United States?

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1 A I think that the first articles that I
2 began writing concerning public broadcasting directly
3 were in 1991, prompted in large part by cutbacks in
4 the New York Station WNET. That led me to write a
5 longer feature article that was published in 1992 in
6 the Village Voice where I'm a staff writer.

7 And I continued to cover topics as they
8 arose and determined that actually no one had written
9 a really good book that was a history, so I chose to
10 do that beginning in 1994.

11 Q And this history you have described, has
12 that been published?

13 A Yes, it's published. I have a copy of it
14 here.

15 Q When was it published?

16 A The publication date was November 1997,
17 which is the 30th anniversary of the Public
18 Broadcasting Act.

19 Q And what is the name of the Publisher?

20 A The publisher is Verso Books.

21 Q And how many copies of the book are in
22 print?

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1 A I believe that the first print run was
2 somewhere in the neighborhood of 4,000 copies, and it
3 has gone back to the printer for a second printing
4 which is another 1500 copies.

5 Q And how long did it take you to research
6 and write this book?

7 A Approximately two-and-a-half years; two to
8 two-and-a-half years.

9 Q And what kind of materials did you study
10 in preparation -- what did you do in order to research
11 the book so to speak?

12 A There was a vast amount of research. A
13 lot of it involving archival research, visiting the
14 National Public Broadcasting Archive which is in
15 Maryland -- I think three or four times -- various
16 Presidential archives where documents from the
17 Corporation for Public Broadcasting for past
18 administration for past Administrations are; so the
19 Nixon Library, the Carter Library, etc.

20 Interviews with current and former
21 officials of various public broadcasting entities and
22 library research.

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1 Q Did it also have interviews? I'm sorry,
2 you may have said it but I didn't hear it.

3 A Interviews, yes. Original --

4 Q Who did you interview?

5 A I probably did -- I don't have a precise
6 figure -- but I would say several dozen interviews
7 with people, including current officers of the
8 Corporation for Public Broadcasting, former members of
9 the Board of Directors of the CPB, the former
10 President of PBS, Larry Grossman, people who were
11 involved in some of the original drafting of the
12 legislation. The late Fred Friendly was instrumental
13 in some of the early days of public broadcasting.

14 Q Incidentally, did you make use of a book by
15 a gentleman named Day?

16 A Yes, I did.

17 Q What book was that?

18 A Mr. Day's book, which is a fine book, was
19 published as I recall, in summer or -- spring or
20 summer of 1995. I had not previously been aware that
21 it was in publication -- that it was in the works.
22 And it overlapped to an extent, with some research

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1 that I'd already done.

2 And I would say -- and I also went to
3 visit Mr. Day in his office and he very graciously
4 allowed me to use some of his research. He was very
5 well organized and has been collecting material for
6 decades.

7 Q What is the general subject of the book?

8 A Of my book?

9 Q Yes.

10 A It's a history, it's a chronology of
11 public broadcasting from its early days as a
12 Federally-funded organization to the present. It
13 takes a particular perspective that public
14 broadcasting has, for lack of a better phrase, strayed
15 from its mission, and it tries to examine how and why
16 that straying occurred.

17 Q Has the book been reviewed in the general
18 press?

19 A There have been, I think, over 20 reviews,
20 including The New York Times, Washington Post, Boston
21 Globe, Dallas Morning News, some of the weekly
22 magazines.

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1 Q And have excerpts been published by any
2 national periodicals?

3 A There was an excerpt that ran in the
4 Nation magazine in December, and I did, I guess you
5 would call it an op-ed related to the book for Salon,
6 which is an on-line magazine.

7 Q And finally, have you given any lectures
8 or served on any panels, discussing the subject of
9 public broadcasting in the last year or two?

10 A Very many.

11 Q Well, what's "very many"?

12 Q Half a dozen, you know, plus there are
13 some scheduled. I was on a panel -- I delivered a
14 paper last week, the Columbia Institute for
15 Teleinformation at Columbia University on the
16 financing and economics of public television.

17 MR. SCHAEFFER: I would now proceed to the
18 actual testimony. I don't know if Mr. -- I would
19 submit this as an expert in the subject of public
20 broadcasting.

21 CHAIRPERSON GRIFFITH: Do you have any
22 questions?

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1 MR. RICH: No voir dire.

2 CHAIRPERSON GRIFFITH: No voir dire.

3 BY MR. SCHAEFFER:

4 Q Mr. Ledbetter, were you asked to do
5 something by White & Case in connection with this CARP
6 proceeding?

7 A Yes, I was.

8 Q What were you asked to do?

9 A I was asked to produce a paper of a
10 particular length, exploring essentially the
11 differences between the public broadcasting world
12 today versus the public broadcasting world 20 years
13 ago when my understanding is, the last negotiation of
14 this kind took place.

15 Q And did you reach any conclusions?

16 A I did.

17 Q What were your conclusions?

18 A I think that, stepping back and looking at
19 the big picture for a moment, one of the most
20 important differences is that that public broadcasting
21 world is much, much larger now than it was 20 years
22 ago, in almost any way you want to measure it.

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1 That would include the number of people
2 who contribute to the system, which I think has --
3 well, I want to -- may I consult my written statement?

4 Q With the permission of the arbitrator.

5 A Certainly the overall budget of public
6 broadcasting has almost quadrupled in the 20-year
7 period. We're talking about approximately \$550
8 million in 1978 to approximately \$2 billion today, so
9 an almost 4-fold increase in total expenditures.

10 Similarly, the number of people who give
11 to public broadcasting has risen dramatically. In
12 1977 that would be 2.7 million individuals
13 contributing to public television and radio for a
14 total of about \$50 million.

15 That current figure is now over 5 million,
16 so it's almost doubled, and another 1.8 million to
17 public radio, bringing in \$418 million. So an 8-fold
18 increase in the amount given by viewers and listeners.
19 Which I think is -- most people would agree, a very
20 good measure of how the system has grown and expanded.

21 There are more specific things that I
22 discussed, but I think for the general question that

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1 you asked me, that growth, that expansion, is the
2 dominant trend.

3 Q And did you come to any conclusions about
4 the more commercial aspects of public television over
5 the years, and if so, what were they?

6 A Well, one of the concerns that is
7 addressed in my book and that many critics have
8 pointed out, is that in order to achieve this growth
9 and accommodate the growth, that the system has
10 changed its direction.

11 Public broadcasting was founded with the
12 notion that commercial broadcasting had certain
13 weakness. There were things that it didn't do very
14 well. It didn't provide cultural programming
15 particularly well, it didn't provide educational
16 programming very well, it didn't do a lot of full-
17 length documentaries -- this was of course in the
18 1960s when you were talking about three major
19 networks.

20 And it was founded with the notion that it
21 would supplemental commercial broadcasting in order to
22 achieve those ends. It would be a voice for

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1 alternative points of view that were not heard in the
2 commercial arena; that it would reflect America in all
3 its diversity.

4 The concern that I have -- and I think
5 that forms the main pieces of my book -- is that by
6 becoming a more and more commercialized enterprise to
7 expand as we've discussed -- that it lost its path.
8 It no longer seeks primarily to achieve those ends but
9 is now in essence, a multi-billion-dollar business
10 that is in many ways, a kind of offshoot of commercial
11 media instead of an alternative to it.

12 Q Now, is it fair to assume that the direct
13 testimony, the report that you prepared, reflects in
14 detail the reasons for your conclusions?

15 A Yes it is.

16 Q Let me ask you some specific questions,
17 with permission of the panel. Did you compare the
18 overall income and expenditures in 1978 and in 1996 or
19 1997, and if so, what were the results of that
20 comparison?

21 A Yes, I did.

22 Q Could you tell us what they are? And if

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1 you want to refer to pages of your report, I think it
2 might be helpful to the arbitrator.

3 A I will do that. In 1978 -- as I
4 previously mentioned, the overall -- and this is from
5 pages 1 and 2 of my written statement. The overall
6 income for public television and radio was
7 \$552,325,000. The origin of that money was primarily
8 from governmental entities, and this is broken down on
9 page 2.

10 So 31 percent of that came from State
11 governments; 29 percent from the Federal Government;
12 8 percent from local governments. So added together,
13 nearly 70 percent of the funding 20 years ago was
14 governmental. This is not particular surprising
15 because that was the origin of the system.

16 It grew out of educational broadcasting in
17 the 1950s and 1960s, and in many cases the licensees
18 of public television and radio stations are
19 universities, and very often, State-funded
20 universities. So that governmental funding had a
21 perfectly valid reason for being; perfectly
22 understandable.

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1 Today, while that budget as I said, has
2 increased by nearly a factor of four, it switched.
3 It's no longer a primarily government-funded entity,
4 despite the tendency of some critics to portray it
5 that way. In fact, now the figure that was once 70
6 percent from government sources is now down around, I
7 believe, 30 percent.

8 And I have it broken down here on page 3,
9 of 16.7 percent of the overall expenditures from State
10 government, 14.9 percent from the Corporation for
11 Public Broadcasting, which is a Federal -- and
12 assorted other Federal Government and local
13 government; approximately 30 percent.

14 So if you can imagine a sort of
15 fluctuating graph where government funding used to be
16 and private funding used to be, have now essentially
17 switched. So that we're talking about a system that's
18 primarily funded through the private sector. The
19 chief funders there being subscribers and
20 underwriters.

21 Q Where did you get these particular figures
22 from? The stats that appear on page 3?

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1 A These figures come from the Corporation
2 for Public Broadcasting which annually makes available
3 a document -- which I have with me -- called
4 "Frequently Asked Questions About Public
5 Broadcasting".

6 MR. SCHAEFFER: That's Exhibit 308 of the
7 ASCAP case.

8 THE WITNESS: I'll take your word for
9 that.

10 MR. SCHAEFFER: I have copies here to make
11 it more convenient for you to look at if you'd like to
12 look at them. And why don't I just pass them around?
13 And I think he's talking about page 7.

14 THE WITNESS: Yes, page 7 of that
15 document.

16 BY MR. SCHAEFFER:

17 Q Has there been a change, in your view, in
18 the way public broadcasting -- particularly public
19 television -- has proceeded in order to obtain these
20 sums of money from non-governmental sources? And if
21 so, what was that?

22 A Well, again, if you look at the, sort of

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1 intellectual origins of the public broadcasting
2 system, the notion was that -- the people who planned
3 this wanted to free non-commercial television and
4 radio from the sort of ratings chase of commercial
5 broadcasting.

6 The idea being that if you're always
7 trying to maximize your audience with every single
8 broadcast, as commercial broadcasters do, they'll be
9 lots of things you won't be able to do. It's very
10 hard to do programming for minority groups, for
11 example, if you're constantly trying to maximize
12 audience.

13 It's very hard to do controversial and
14 sort of difficult public affairs work, because the
15 audience for that is relatively small, even though
16 it's of course, of tremendous importance.

17 Once public broadcasting began relying as
18 heavily as they now do on subscribers, in my view what
19 they have done is, they have sort of reproduced the
20 ratings chase in a different way. Instead of pursuing
21 ratings they're pursuing donor dollars.

22 And the concern there is that in order to

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1 garner more and more membership subscriptions, more
2 and more donations, they have to show programming
3 that's very, very popular, and so they become more and
4 more like they're commercial cousins.

5 And this is not a particularly original
6 observations on my part. It's been echoed for at
7 least a decade by a number of critics. It's been
8 noted for example, that the fastest growing program on
9 public television in the late '80s and early 1990s,
10 was reruns of the Lawrence Welk show.

11 I believe between two-thirds and three-
12 quarters of all PBS affiliates now show these reruns.
13 In the authorization for the 1988 Public Broadcasting
14 Bill there was concern --

15 JUDGE DREYFUS: Excuse me for
16 interrupting.

17 THE WITNESS: No, that's all right.

18 JUDGE DREYFUS: What's the significance of
19 that?

20 THE WITNESS: Of the Lawrence Welk?

21 JUDGE DREYFUS: Yes.

22 THE WITNESS: The significance from my

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1 point of view is that -- and I don't want to appear
2 condescending here because Lawrence Welk is a
3 legitimate program and has a real audience -- but I
4 think it's fair to say that that was not the purpose
5 of public television as originally envisioned by its
6 founders.

7 Lawrence Welk was already shown on
8 commercial television during the period when they were
9 trying to come up with an alternative. So the idea
10 that that alternative would now be used to rerun the
11 stuff that was on commercial television at the time,
12 seems strange -- seems like a discrepancy.

13 As I was saying, in the Congressional
14 authorization for the 1988 version of the Public
15 Broadcasting Bill -- and I have quoted this in my
16 written statement -- the Congressional committee said
17 the following: "Some public television stations
18 increasingly are turning away from traditional public,
19 educational, or informational programming and
20 broadcasting instead, programs which had originally
21 appeared on commercial television years ago, such as
22 Disney, The Avengers, Lassie, Ozzie and Harriet, and

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1 Star Trek".

2 And again, I don't have a problem with any
3 of those programs. I happen to be a big fan of some
4 of them. But the concern that Congress had and
5 certainly the concern that I had, is that there are
6 plenty of commercial outlets for programming like
7 that. Public television is supposed to provide an
8 alternative to those commercial outlets, not simply
9 reproduce the material that airs there now or aired
10 there once upon a time.

11 And I would say that -- as I said, that
12 was from 1988 -- that that trend has only increased in
13 the ensuing decade.

14 BY MR. SCHAEFFER:

15 Q Now, did you attempt a comparison in
16 production fees between commercial television and so-
17 called, public television?

18 A Yes.

19 Q What did you find?

20 A Production fees, of course that's the --

21 Q First of all, what is a production fee?

22 A Yes, exactly. Production fee is the cost

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1 to produce a program for television that's usually
2 measured in a per minute or per hour cost. And of
3 course, these costs can vary widely, and it's best not
4 to be too literal-minded about these things.

5 However, since the purpose of this paper
6 was to compare what things were like in 1978 roughly,
7 to what they're like now, I simply asked the question,
8 what did it cost to produce an hour of public
9 television in 1978.

10 And one estimate is that the Forsythe Saga
11 which was purchased in the 1970s by Mobil to be shown
12 on public broadcasting, was acquired at the cost of
13 \$390,000 for 39 hours -- or \$10,000 per hour. And I
14 think that that's probably a fair estimate of an
15 approximate production cost at that time.

16 Today it is quite common for public
17 television to spend more than a million dollars on a
18 single program; a single program that may only air two
19 or three times, and I've produced several examples in
20 my statement. I think it would surprise a lot of
21 people to learn that in many cases the production
22 costs for public television are higher than they are

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1 in some areas of commercial broadcasting.

2 One example that was published in the
3 Boston Globe last year was that documentaries that are
4 made with WGBH, the Boston affiliate, are budgeted at
5 between \$500,000 and one million dollars per hour. So
6 an astronomical increase in production costs from what
7 it was in the '70s.

8 And the comparison that a public
9 broadcasting trade publication made was that the Art
10 and Entertainment Network says that they spend about
11 \$150,000 per hour. So public broadcasting can be a
12 very expensive enterprise, and I should say, that's
13 not a criticism.

14 I mean, the documentaries are often of
15 very high quality and merit that kind of money, but
16 the point that I was trying to make is that they are
17 now quite competitive with commercial broadcasters and
18 arguably, spend more to produce certain programs than
19 would be the case in commercial broadcasting.

20 Q Have you attempted to get some sort of
21 handle on the amount of overall expenditure, not just
22 the anecdotal examples you've given us, with respect

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1 to programming stats?

2 A I did. This is an area where precision is
3 hard to come by. The question that I posed is, how
4 much money does this entity that we call public
5 television, public broadcasting, spend on programming?
6 It's not really broken down that clearly by the
7 publicly available information.

8 And I should say, because this is not
9 necessarily obvious, there is no national entity that
10 produces public television programs. PBS does not
11 produce anything; they are a distribution system. The
12 CPB does not produce anything; they are a funding
13 mechanism. All the material that runs on public
14 television is produced either by a member station or
15 by an independent producer outside the system, or very
16 often, imported from -- primarily Great Britain.

17 Because of that decentralized structure,
18 it's very, very difficult to come up with a firm
19 figure for how much you spend on programming.
20 However, I relied in this statement on a study that
21 was done in 19 -- I believe it was 1989 -- by the
22 Boston Consulting Group, BCG.

1 It was hired by the Corporation for Public
2 Broadcasting to answer questions just like that, and
3 related questions. And using the model that they
4 offered, and looking at the stations that produced the
5 bulk of the programming and the programming budgets of
6 those top-10 stations, I believe that the estimate
7 that I came up with was approximately a billion
8 dollars a year. And that would be competitive with
9 that spent by the big commercial networks.

10 Q Now, do you have an opinion as to why that
11 increase in program expenditure came about and what
12 was the background of it?

13 A Well, I think -- I'm not exactly clear on
14 what you're asking but I think that the answer is --
15 goes back to this question of growth, of the growth of
16 the public broadcasting world in this 20 years and the
17 increase in viewership and as -- I mean --

18 Q Wasn't to some extent, in your opinion --
19 and I'm asking this now -- weren't events in the
20 national government and questions of funding --

21 A I see what you're saying. I see what
22 you're saying, yes.

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1 Q -- inspire some of this? In fairness to
2 PBS and NPR?

3 A Yes. I mean, I think it's important to
4 have some historical understanding of a couple of
5 watersheds in the way that the public broadcasting is
6 funded. The Nixon Administration actually vetoed a
7 public broadcasting authorization bill in 1972. That
8 sent a kind of shock wave through the system.

9 And because of the large amount of
10 government funding in the early '70s, the idea that
11 suddenly the government might cut the money off --
12 which was a very imminent possibility -- made it clear
13 to public broadcasters that they had to shift gears,
14 and that's when they began soliciting some of the
15 larger corporation donations -- you know, in the
16 millions of dollars which had previously not -- the
17 quantities had not been that large.

18 Another watershed occurred in the early
19 1980s. Again, the Reagan Administration threatened to
20 then, and did, veto at least one public broadcasting
21 authorization bill. And Congress at that time created
22 a temporary commission on alternative financing, which

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1 goes by the infelicitous acronym of TCAF.

2 And TCAF came up with a number of
3 suggestions what public broadcasters could do to
4 supplement and eventually replace their reliance on
5 government funds. One moment.

6 Q Okay.

7 A Those recommendations are referred to
8 specifically in my statement, but generally speaking
9 what they were, were various kinds of commercial
10 activities. So TCAF said to the stations, we're going
11 to allow you to experiment with commercials. Some
12 stations will now run 30-second spots that are very
13 similar to ones that run on commercial television.

14 We are encouraging you to rent out your
15 facilities to private businesses. We are encouraging
16 you to engage in greater merchandizing. This sort of
17 semi-privatization -- for lack of a better word --
18 that was very much encouraged by the government. And
19 the stations, I think it's fair to say, took that ball
20 and ran with it.

21 Q Could you make a comparison between the
22 degree to which the Federally-funded Corporation for

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1 Public Broadcasting finances programs and the stations
2 themselves?

3 A Let me reiterate that the Corporation for
4 Public Broadcasting does not produce programs. It
5 does give grants to certain -- chosen programs. But
6 primarily that money that is appropriated by the
7 Federal Government, ends up at the stations. The
8 majority of that money ends up in the form of what are
9 called community service grants to individual stations
10 on a year-by-year basis, depending on their size.

11 The bulk of the best-known programming on
12 public television is produced by the stations
13 themselves, and it's really only a handful of
14 stations. -- approximately 350 affiliated stations.
15 Of those, more than 300 produce no programming for the
16 national schedule.

17 So you have a small number of stations --
18 the larger stations in the big markets -- that produce
19 the programming and then sell it throughout the
20 system.

21 So given that and given the importance of
22 that to the funding of programming, I looked at -- for

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1 purposes of this paper -- three stations that are
2 among the largest and among the big producers. And if
3 I may, just to respond to your question, I'd like to
4 start with WGBH.

5 Q First of all before you do that, how did
6 you pick the three stations?

7 A Primarily, I tried to pick the ones that
8 are responsible for some of the better-known
9 programming. I tried to pick the ones that are in the
10 largest markets and a slight nod to geographical
11 diversity -- which is to say, I included Los Angeles.

12 Q Would you tell the panel what you found?

13 A Yes. I think it's instructive to look --
14 I'm now referring to page 16 of my statement -- I
15 think it's instructive to look at WGBH because, in
16 terms of its budget -- I'm sorry, in terms of its --
17 no, that's exactly right. In terms of its budget it
18 is the largest station in the system.

19 Its annual revenues, annual budget is
20 approximately \$145 million. It employs 1,186 people:
21 165 people in fundraising alone; 160 in national
22 programming, 125 people in radio; 40 in local

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1 television production. That's a lot of people. I
2 mean, 1200 people at a single station is much larger
3 than the vast majority of commercial stations employ.

4 And they have a lot to do, because WGBH is
5 the largest supplier of programming for national PBS
6 distribution. It produces The American Experience, it
7 produces Frontline, Mobil Masterpiece Theater,
8 Mystery, NOVA, This Old House, and a number of other
9 programs, including programs that show only locally in
10 the Boston area.

11 It's almost like a mini-network if you
12 think about it: the number of programs that it
13 produces, the number of people that it employs. And
14 again, it's not clear to the average viewer -- I mean,
15 people think of public television they think of PBS as
16 being the big entity, but really the stations are the
17 heart of the matter.

18 In conjunction with what I was discussing
19 before about the TCAF recommendations, WGBH was also
20 on the forefront of engaging in some of these
21 commercial enterprises.

22 In the early 1990s they made a partnership

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1 with a store called Learningsmith. I don't know if
2 there's one in Washington or not, but it's a store
3 that's usually in malls and it sells various
4 merchandise associated somehow loosely with public
5 broadcasting.

6 If you go there and -- you can get
7 anything with the Sesame Street logo on it, you can
8 get a placemat or what-have-you, books that are
9 related to public broadcasting -- and then a general
10 line of merchandise that's just related to children's
11 games, things of that nature.

12 Those stores nationwide -- I think I have
13 the revenue in here -- no, actually, maybe I don't
14 have it here, but in the book, it's a business with
15 annual revenues of between \$40 and \$50 million. WGBH
16 get a percentage of each sale in that store.

17 Q Would you compare the estimated annual
18 revenues of WGBH with the other Boston network
19 stations?

20 A Yes.

21 Q IF you could tell us what they are?

22 A Yes. As I mentioned, the annual budget of

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1 WGBH is about \$145 million. The Boston CBS affiliate,
2 which is WBZ, has annual revenues estimated at \$85.4
3 million; the NBC affiliate, WHDH, \$118 million; ABC
4 affiliate, WCVB, \$119 million.

5 So the public station in Boston is
6 actually, by a fairly large factor, larger than any of
7 the commercial stations in that market. That is I
8 think, testimony to the tremendous growth and
9 expansion of public television.

10 Q Now, there's a well-known program -- I
11 think -- on public television called This Old House.
12 And would you describe the arrangements by which This
13 Old House is exploited by WGBH?

14 A Yes. This Old House has to be considered
15 one of the big hits of public television, and it is so
16 successful and such a moneymaker for WGBH that it has
17 not -- it has essentially become a -- it's like Martha
18 Stewart.

19 I mean, it's simultaneously a television
20 program, a magazine, and it now goes out to commercial
21 broadcasters. They put out a version that has like a
22 little 7-minute cut at the end where commercials can

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1 be stuck in so it can be shown on commercial
2 television.

3 WGBH has made a partnership with Time-
4 Warner to publish This Old House Magazine. In 1996
5 This Old House Magazine had a rate base of 300
6 readers. Advertisers pay nearly \$16,000 a page for
7 full color advertising, and that's about the same
8 amount that you pay to advertise for 30 seconds on the
9 privately distributed version of it.

10 Given that and given that there are more
11 than 400 episodes in existence, I estimated that that
12 single program represents a potential \$89.6 million in
13 advertising revenues for WGBH. And given that
14 importance, the guy that hammers the nails, Norm
15 Abrams, make more than \$350,000 a year because the
16 program has been such a success.

17 Q I'm going to shift your attention a little
18 further south to New York, and WNET. What do you
19 discuss about WNET in terms of its relevant size and
20 its comparability to its commercial analog?

21 A WNET -- the thing that strikes me about
22 WNET is that -- I would say that they're sort of at

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1 the cutting edge of fundraising techniques. I think
2 part of that is that the New York Metropolitan Area is
3 a relatively wealthy area; there's a lot of capital
4 there.

5 But they have -- they also produce many of
6 the well-known programs for public television
7 including Great Performances, American Masters,
8 Nature, Adam Smith Money World, Live from Lincoln
9 Center, and Charlie Rose.

10 Q In fact, you've been on Charlie Rose,
11 haven't you?

12 A I was on Charlie Rose discussing this book
13 with the President of PBS, yes.

14 Q I'm sorry to interrupt.

15 A That's okay. They spend approximately \$55
16 million annually -- that one station spends
17 approximately \$55 million annually to produce its
18 various programs. I think one of the most impressive
19 things that WNET has done of late was it decided to
20 make a kind of capital program -- not dissimilar to
21 the way that some private universities do.

22 And they were actually able to raise \$70

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1 million in an endowment. That's not for immediate
2 expenditures, not for programming; just a nest egg to
3 sit on, of \$70 million. That figure, \$70 million, is
4 easily the entire annual budget for most commercial
5 stations in the United States. And here, WNET has it
6 simply as an endowment.

7 WNET has recently become a major
8 institutional investor, as I say in the statement.
9 They have \$11.4 million in bond funds in 1995, and in
10 a single year that figure rose to \$27.2 million.

11 And I think -- the reason for bringing in
12 these details about the investments of that stations
13 that -- I think it's very easy to get the impression,
14 certainly from watching public television, that they
15 always want your money; that they exist in an
16 atmosphere of scarcity.

17 And to some degree because of the way the
18 system is structured, that's true. But they are also
19 among the largest charitable organizations in the New
20 York area. I mean, their buildings alone are worth
21 more than the budgets of commercial network programs.

22 Q Let's go across country to KCET in Los

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1 Angeles. I'm particularly interested in respect to
2 KCET, its comparability to any commercial stations or
3 commercial enterprise.

4 A The thing that interests me most about
5 KCET, the Los Angeles station, is that they are
6 innovators in the field of marketing public
7 television, which as you'll see in later portions of
8 my statement, is really becoming one of the big
9 moneymakers.

10 KCET does licensing for Puzzle Place,
11 which is a big hit -- children's show fairly recently
12 introduced. They have what -- the station has a 49
13 percent interest in a joint venture with a private
14 media company to merchandise and license the Puzzle
15 Place name.

16 I believe there's space in every Toys R Us
17 specifically dedicated to Puzzle Place, and KCET gets
18 a portion of that. They also, in 1996, began a --
19 they got a \$2 million royalty payment from a private,
20 direct marketing firm called DIMAC, which I believe is
21 a division of Rupert Murdoch's News Corporation.

22 And they used the KCET name in marketing

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1 ventures with private companies and expect to be
2 getting millions of dollars a year in revenue just for
3 that. And like WGBH, KCET also has a store that's
4 affiliated with it called The Store of Knowledge;
5 again, a large, mall-based -- I believe there are now
6 more than 30 stores nationwide, and KCET gets a
7 percentage of all the sales that occur through that
8 store.

9 And they are also one of the stations
10 that's now running full-blown, 30-second commercials
11 on the air that are in many cases, the exact same
12 commercials that run on commercial television.

13 Q Let's move on to that subject. Over the
14 years, would you comment about the changes in the so-
15 called underwriting programs of the public television
16 and radio stations as you understand them?

17 A Right. Again, if you go back to the
18 original legislation and the intent of public
19 broadcasting, commercials were deemed to be one of the
20 problems of commercial broadcasting; one of the things
21 that kept it from being able to do what it did. So
22 when the system was originally set up it was called

1 non-commercial broadcasting.

2 And in those small instances where private
3 firms did help fund shows, they were reduced to what
4 are called tombstone ads. They just run, you know,
5 Mobil, just in plain type, and it would be on the
6 screen for maybe two to three second at the end of a
7 program; something along those lines.

8 That has changed dramatically, and the
9 guidelines by which PBS allows private companies have
10 been progressively loosened, progressively
11 liberalized. To the point where now, as I say, many
12 stations run as they're indistinguishable from those
13 on commercial television.

14 Just by way of comparison, in 1977 public
15 television took in about \$38 million in corporate
16 underwriting. In 1995 that figure was more than \$215
17 million; so it has more than quintupled the amount of
18 money that public television receives in the form of
19 corporate underwriting.

20 This is perfectly natural. The
21 corporations are responding to what are, in essence,
22 better rules for them. They now have much better

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1 promotional opportunities on public television than
2 they did in its early days.

3 In my view, public broadcasting recently
4 has taken this trend even a step beyond that, to the
5 point where private firms are now allowed, not only to
6 underwrite programming, but essentially to produce
7 programming. They become the producers. They get to
8 determine to a great extent, the content, and this
9 leads to some instances that I think a lot of viewers
10 would consider to be a conflict of interest.

11 Because there are guidelines about what
12 public television would be used for. But in my view
13 there have been a number of instances where the
14 connection between the interests of the underwriter
15 and the content of the program have been far too
16 close.

17 To give an example, in the written
18 statement I have a citation from 1976, PBS
19 underwriting guidelines, and they say: "Underwriting
20 of a program will not normally be accepted from an
21 organization having a direct and immediate interest in
22 the content of a program".

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1 For example, underwriting of a program
2 about the benefits of gardening would not be accepted
3 from a seed company. Underwriting of a program about
4 the alleged dangers of sugar substitutes would not be
5 accepted from a sugar manufacturer, and so on.

6 One example that they gave in those
7 guidelines: "PBS will not accept a program on the
8 history of the computer by a computer manufacturer".
9 As an example of how times have changed, in 1992 -- I
10 think it was 1992 -- PBS did accept a history of a
11 computer underwritten by Unisys. It was called "The
12 Machine That Changed the World", and a \$1.9 million
13 grant came from Unisys.

14 So that the conception of the public
15 broadcasting airwaves as something that sort of needed
16 to be protected from possible conflicts of interests
17 from underwriters, that perception really no longer
18 exists at public broadcasting. In fact, the
19 leadership of public broadcasting today very actively
20 solicits -- they go around the country and meet with
21 advertisers and they solicit corporate underwriting
22 and basically say, we will come up with programming

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1 that is tailored to meeting your needs as an
2 underwriter.

3 My concern -- this is perhaps outside the
4 scope of this inquiry -- but the reason that I
5 concentrate on that is I think that that is contrary
6 to the mission of public television.

7 Q Let me ask you some specific questions.
8 Would you comment the degree to which now commercial
9 firms in the United States are making contributions to
10 the public television stations out of their
11 advertising budgets as opposed to their charitable
12 budgets?

13 A Yes. In -- give me one second.

14 Q That would be 22.

15 A Thank you. In the old days of the 1970s
16 public television, public radio were viewed as a
17 charity, philanthropy, and those corporations that did
18 choose to underwrite programming, generally speaking,
19 allocated those funds out of their charitable or
20 philanthropic divisions.

21 That is primarily not the case any more.
22 Beginning in the late 1980s and early 1990s, the

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1 Corporation for Public Broadcasting began to notice
2 that the money that was being used was coming out of
3 the advertising and marketing budgets of these
4 corporations rather than their -- which makes perfect
5 sense.

6 I mean, that's what they're doing.
7 They're using the public television, public radio for
8 advertising and marketing purposes, but again, I think
9 that shift represents an important qualitative
10 difference in what public broadcasting does today
11 versus what it did 20 years ago.

12 Q Would you comment on the significance of
13 the 30-second spot and the 30-second underwriting
14 statement, so-called, in public television?

15 A Again, if you start from the belief that
16 public television has a unique identity and unique
17 mission, you have to ask yourself, at what point does
18 it sacrifice that uniqueness if it's running
19 advertisements that are the same as those that run on
20 commercial television?

21 Not all stations are doing this at the
22 moment, but the great trend is toward more and more

1 advertising and more and more advertising that
2 resembles -- that exists on commercial television. At
3 present, there are still some distinctions between
4 what you can do on public television and what you can
5 do on commercial television.

6 For example, you can't -- they don't allow
7 comparative advertising, which most people call
8 negative advertising. You can't sort of insult your
9 competitor. And you're not supposed to have what the
10 FCC calls a "call to action". You're not supposed to
11 say, buy this product; you're allowed to say, this
12 product is wonderful.

13 But these are, I think, very, very fine
14 distinctions and in much of the legislation that's
15 been kicking around Capitol Hill for the last couple
16 of years, even those restrictions have been proposed
17 to be removed.

18 And there is sort of on the table now, a
19 proposal from Lawrence Grossman, the former President
20 of PBS, to create an entirely separate PBS channel
21 that would on certain nights, have advertisements just
22 like commercial television. And that that money would

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1 then subsidize the rest of the system.

2 So I think increasingly it's becoming
3 quite difficult for the average viewer, and certainly
4 as a scholar, to distinguish between public television
5 and commercial television.

6 Q Would you comment briefly on the use of
7 underwriting of the kind that you're describing, in
8 connection with children's programs on television?

9 A Because of public television's educational
10 roots the restrictions on the kinds of underwriting
11 that is allowed and the relationship between the
12 underwriter and the program, have usually been most
13 vocally, sort of most concentrated on children's
14 programming.

15 The notion here being that, you know, we
16 want to as much as possible, protect children from
17 undue marketing; sort of the kind of things you see
18 quite commonly on commercial television. And that's
19 been sort of the locus of the enforcement of a lot of
20 these restrictions.

21 And I have to say that given what is
22 currently allowed on public television, it's not clear

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1 to me that they're enforcing these things at all.

2 Q Would you give us an example?

3 A Certainly. In the fall of '96 Frito-Lay -
4 - which was one of the underwriters of the PBS program
5 Wishbone, tried to use its character, Chester Cheetah
6 -- who is the logo for Cheetos snacks -- at the end of
7 the programming on Wishbone. And there was a lot of
8 public outcry about this. It was considered to be
9 misuse of the medium, and in fact they dropped it.

10 But nonetheless, I mean Chef Boyardee, GAP
11 Kids, Libby's Juicy Juice are very, very present in
12 the messages that follow children's programming.
13 They're on the Website. If you want to go to the
14 program's Website the advertising is right there for
15 the kids to see it.

16 And it's pretty clear that -- and in fact,
17 the FCC has sort of wagged its finger from time-to-
18 time at public television for this fairly blatant
19 marketing to children.

20 Q Would you identify something called the
21 PBS Sponsorship Group?

22 A Yes. I referred earlier to PBS, sort of

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1 going around the country and soliciting this. The PBS
2 Sponsorship group was a group of public broadcasters
3 who were meeting with ad agencies and underwriters for
4 the purpose of coming up with programming ideas and
5 ways to get more corporate sponsorship, you know,
6 within the guidelines such as they exist.

7 Q What year was that?

8 A That was -- I believe it was 1997. I'm
9 not clear where in my statement that is, but I believe
10 that was in --

11 Q Would you look at page 25? I think it
12 might refresh your recollection.

13 A And indeed it does. It's 1997, and the
14 PBS Sponsorship Group included the large stations that
15 I've mentioned -- KCET, WGBH, WNET, and also WETA in
16 Washington. This is a quote that ran in a trade
17 publication from WNET President Bill Baker.

18 Meeting before advertising executives he
19 said: "Welcome to the new PBS. Corporate messages on
20 PBS get more creative every year. You can show
21 products, you can use slogans". I mean, this is the
22 tenor of PBS leadership today; it's the tenor of the

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1 pitchman, and it is part of what I would consider to
2 be full blown commercialism that is pervasive
3 throughout the system.

4 Q Incidentally, what is Current you referred
5 to?

6 A Current is a very good weekly magazine
7 that covers the field of public telecommunications.

8 Q Do you know who are the publishers or
9 owners of it?

10 A I don't. I believe -- it's privately
11 owned. As far as I know it's not part of any kind of
12 larger media organization.

13 Q Would you comment briefly on the strategic
14 business partnerships in which public television
15 stations are partnering up in?

16 A In the early days of public broadcasting,
17 public broadcasting was to a great extent, sort of a
18 self-contained entity. the stations did business with
19 independent producers, they did business with one
20 another, they did business with regional networks.
21 But they tended to stay within a fairly small universe
22 of public broadcasters.

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1 Today, that's no longer the case. What
2 you see more and more are private media firms teaming
3 up with public broadcasting in order to produce
4 programming or provide the different kinds of service.
5 I would say that there is not a single, large,
6 communications entity in the United States today that
7 does not have some sort of strategic partnership with
8 public broadcasting.

9 So whether you're talking about Time-
10 Warner, Disney, Murdoch, MCI -- they all have some
11 little arrangement with public television that, in my
12 view, has transformed the medium into kind of a
13 marketing niche for commercial media. This is not
14 something that's happened by accident. This is quite
15 deliberate policy on the part of the leadership of
16 public broadcasting.

17 The current President of PBS is Ervin
18 Duggan, the former FCC Commissioner. When he took
19 over the Presidency in 1994 he announced a 120-day
20 initiative he called "Operation Momentum", and I have
21 some of the details from Operation Momentum; pages 27
22 and 28.

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1 So that they made an agreement with Turner
2 Home Entertainment to distribute PBS videos, and part
3 of that agreement is that Turner would submit up to
4 \$10 million to produce the programming that would run
5 on PBS and then be sold through the Turner system of
6 distribution.

7 Buena Vista Television which is a
8 distributor that is a division of Disney, which is of
9 course, a division of Capital Cities, helps promote
10 "Bill Nye, The Science Guy", which is a children's
11 show that runs on public television during the
12 weekdays, and on the weekends it runs on commercial
13 television where it's distributed by Buena Vista.

14 Then there are many other examples of
15 computer manufacturers and telecommunications firms.
16 And I think that one of the effects that this has is
17 that the -- it becomes harder for the viewer to
18 distinguish what is a public television program and
19 what is a commercial television program.

20 Perhaps the best example of this is one of
21 the best-known shows on public television -- it's now
22 called the Newshour with Jim Lehrer; formerly the

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1 MacNeil/Lehrer Newshour -- is actually owned by a
2 production company, or is produced by a company that's
3 two-thirds owned by TCI, the largest cable provider in
4 the United States.

5 I don't think most viewers know that.
6 It's not identified on the screen. They don't have a
7 TCI logo that appears anywhere. And so there's a kind
8 of convergence between what commercial media is doing
9 and what so-called public broadcasting entities are
10 doing that I think will only increase as time goes on.

11 I mean, this is sort of the hot thing in
12 public broadcasting as the existence of Operation
13 Momentum makes clear.

14 CHAIRPERSON GRIFFITH: Mr. Schaeffer, let
15 me just interrupt you. Let's take our regular morning
16 recess. Ten minutes, please.

17 (Whereupon, the foregoing matter went off
18 the record at 11:36 a.m. and went back on back on the
19 record at 11:49 a.m.)

20 BY MR. SCHAEFFER:

21 Q Mr. Ledbetter, finally, would you address
22 your attention to the changes in public radio that you

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1 have concluded took place since 1978?

2 A Yes. I think that it's fair to say that
3 the growth and expansion of public radio in the last
4 20 years is even more dramatic than that of public
5 television.

6 NPR began as an operation in 1971 and so
7 in the mid to late 1970s it was still in many ways in
8 its infancy. Today, it is a very well respected,
9 world-wide news gathering operation. Just to put it
10 into statistics, in --

11 JUDGE DREYFUS: Before you do, how do you
12 see its mission?

13 THE WITNESS: Well, I think it's similar
14 to -- its mission is similar to that of public
15 television in that it is intended to provide an
16 alternative to commercial radio and in my book I've
17 made the argument that I think public radio comes a
18 little closer to meeting its mission than public
19 television does, although it is subject to many of the
20 same kind of commercializing forces that I've been
21 discussing and what people are often called mission
22 creep, sort of moving away from its mission. But

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1 that's in large part because radio is a very different
2 animal from television and radio can do things that
3 television and it's more decentralized. Is that a
4 fair answer to what you asked?

5 JUDGE DREYFUS: It's your answer.

6 THE WITNESS: Okay. The annual budget for
7 National Public Radio in 1978 was \$8.1 million.
8 Today, that figure is --

9 CHAIRPERSON GRIFFITH: Page 38.

10 THE WITNESS: Yes. The question is where.

11 MR. SCHAEFFER: Bottom of the page.

12 THE WITNESS: Yes. Just under \$66
13 million. So more than eight times the budget that it
14 was in 1978. Similarly, the number of stations has
15 increased dramatically from approximately 217
16 affiliates in 1978 to more than 550 affiliates now.

17 As with public television, the number of
18 people that listen has grown dramatically, the number
19 of people who give has grown dramatically. It is now
20 a mature broadcasting entity which I think is fair to
21 say was in 1978.

22 Moreover, beyond simply National Public

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1 Radio, the world of radio is -- the world of public
2 radio is more competitive than the world of public
3 television. PBS more or less has a monopoly or a very
4 large chunk of an oligopoly in public television.
5 Public radio is more competitive. There are
6 alternative service providers today, notably, Public
7 Radio International, which didn't even exist in 1978.
8 And is now measured, using some yardsticks, is
9 actually larger than NPR, although I think it's fair
10 to say that they are a secondary service, so that the
11 universe of public radio has expanded dramatically
12 over the last 20 years.

13 BY MR. SCHAEFFER:

14 Q I think I'm going to conclude this pretty
15 much by -- I take it would you reaffirm that which
16 you've already said in the report which was signed by
17 you and filed in this CARP proceeding on September 28,
18 1997?

19 A I do reaffirm it.

20 MR. SCHAEFFER: I have no further
21 questions.

22 CHAIRPERSON GRIFFITH: All right, Mr.

1 Kleinberg, do you have any questions of the witness?

2 MR. KLEINBERG: No, I don't.

3 CHAIRPERSON GRIFFITH: All right, thank
4 you.

5 Mr. Rich?

6 MR. RICH: Thank you, Your Honor.

7 CROSS EXAMINATION

8 BY MR. RICH:

9 Q Good morning. I guess it's almost
10 afternoon, Mr. Ledbetter.

11 A Good morning.

12 Q Your recent book, you indicated its
13 publisher was Verso, yes?

14 A That's correct.

15 Q That's in fact the imprint of a publisher
16 by another name, is it not?

17 A Yes, it is.

18 Q What is the publisher's name?

19 A New Left Review which is a monthly
20 magazine published out of London.

21 Q I take it, not to quibble too much, that
22 the copyright page of your book indicates that "Verso

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1 is the imprint of New Left Books." Is that perhaps
2 correct?

3 A I guess that's probably right, New Left
4 Books being the publishing arm of New Left Review,
5 yes.

6 Q And you testified, I believe, that your
7 book builds on, among other bricks, an earlier article
8 you wrote for Village Voice in or around 1992, is that
9 correct?

10 A That's correct.

11 Q Am I correct that that article was
12 entitled "Made Possible By ... Why Public TV Sucks"?

13 A That's correct.

14 Q Other than cleaning up the title, Mr.
15 Ledbetter, are the central tenets of the book and that
16 article about the same?

17 A They are certainly similar, the same -- I
18 mean the book is based on much, much more research.
19 The bulk of the research that is in the book was done
20 from the period of say 1994 to 1997, whereas that
21 article obviously appeared in 1992. But they are
22 certainly related theses.

1 Q The perspectives you brought to bear in
2 writing first the article and eventually the book were
3 fundamentally similar, correct?

4 A Yes.

5 Q Now you're a journalist by trade, is that
6 correct?

7 A Yes, I am.

8 Q And a media critic?

9 A That's correct.

10 Q And you've not been employed in public
11 broadcasting, is that correct?

12 A I have never been employed in public
13 broadcasting. I have appeared from time to time on
14 various public television, public radio programs. On
15 a very small number of those occasions I received a
16 small stipend, but I've never been employed in any way
17 by a public broadcast entity.

18 Q Is the answer the same with respect to
19 employment by any commercial broadcasting medium
20 whether radio or television?

21 A I am a creature of print.

22 Q And as a critic, I take it it's your task

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1 to emphasize what is wrong with the media, is that
2 correct?

3 A No. I think the role of the critic is to
4 analyze. Oftentimes that means pointing out what's
5 wrong, but it also means pointing out what's right. I
6 think there are many instances in the book where I
7 sing the praises of what public television, public
8 radio have done.

9 Q Would you turn to page 19 of your book?

10 A Uh-huh.

11 Q For the Panel's convenience, I've simply
12 xeroxed some excerpts of pages I may be referring to
13 from time to time.

14 CHAIRPERSON GRIFFITH: Mr Rich, do you
15 want this marked for identification at this time?

16 MR. RICH: Please, although we probably
17 won't seek to have it ultimately in evidence.

18 CHAIRPERSON GRIFFITH: It would be Exhibit
19 11X for identification.

20 (The document referred to was
21 marked for identification as
22 Public Broadcasters Exhibit No.

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1 11X.)

2 BY MR. RICH:

3 Q Mr. Ledbetter, I direct your attention
4 toward the bottom of page 19. Do you see the
5 statement, "it is the critic's sometimes unpleasant
6 task to emphasize what is wrong"?

7 A I do. Can I finish the sentence, please?
8 It says, "but this volume is written with the belief
9 that public broadcasting has provided many moments of
10 unique brilliance and in the hope, admittedly dim,
11 that it will continue to do so."

12 I think that the two parts of that
13 sentence taken together give a more full description
14 of the critic's task, that is to both celebrate and to
15 criticize.

16 Q I take it that your endeavor to write this
17 book was fundamentally not one to celebrate public
18 broadcasting, is that correct?

19 A The book is a support of the idea of
20 public broadcasting. It is a criticism of current
21 practices of public broadcasting. So it is both
22 critical and supportive.

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1 Q Criticizing only current practice or
2 practice dating back 20 or more years?

3 A Practice throughout the history, yes.

4 Q By the way, have you been paid by ASCAP
5 for your testimony?

6 A I receive an hourly fee for what I'm doing
7 now.

8 Q And approximately how much have you billed
9 and/or collected from ASCAP at this point?

10 A I think it would be in the high four
11 figures. I couldn't give you a precise figure, but it
12 would be under \$10,000.

13 Q And your time here today will be
14 compensated for it?

15 A Yes, I'm actually sort of including that
16 in the ultimate amount, but yes.

17 Q You testified, I believe in response to
18 Mr. Schaeffer that you bring a certain perspective to
19 the task of examining public broadcasting, is that
20 right?

21 A I do believe that I bring a perspective.
22 I actually don't remember saying that to Mr. Schaeffer

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1 --

2 MR. SCHAEFFER: I don't think you did.

3 THE WITNESS: But yes, I bring a
4 perspective.

5 BY MR. RICH:

6 Q I think you said you've taken a particular
7 perspective.

8 A Yes.

9 Q You don't dispute that?

10 A I certainly do not.

11 Q And that's reflected both in the written
12 testimony you submitted here and in your book, is that
13 correct?

14 A Yes, it is.

15 Q And others bring their own differing
16 perspectives to bear in examining public broadcasting,
17 true?

18 A They do.

19 Q Indeed, you mention that your book has
20 been reviewed by the New York Times, among others,
21 correct?

22 A That's correct.

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1 Q And did not the New York Times reviewer
2 indicate that one of the shortcomings of your book or
3 at least a -- something -- the reader of the book has
4 to keep in mind is that you bring to bear a
5 "ideological bias" in presenting your thesis?

6 A She may have used that phrase as a former
7 television critic for Wall Street Journal, I would say
8 that she too has an ideological bias and also she's a
9 paid guest on several public television programs, so
10 I think that perspective and bias are very much in the
11 eye of the beholder.

12 Q You've been an unpaid guest, I take it, on
13 some public television programs?

14 A Right.

15 Q And occasionally a paid guest?

16 A That's correct.

17 Q She might have an equal bias, yes?

18 A My affiliations are included in the book.
19 Hers were not included in the review. That's the
20 distinction I'm drawing.

21 Q Turn to the first page of your book, if
22 you don't mind, page 1.

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1 A Can I just say I thought the Times review
2 was a really good review and it will be quoted on the
3 back of the paperback edition.

4 Q Including ideological bias?

5 A No, I think probably not that part.

6 Q I suspected as much.

7 (Laughter.)

8 Now part of your perspective, I take it,
9 is revealed in the very first page of your book where
10 you write, "In 1994, a month before he officially took
11 the title of Speaker of the House, Newt Gingrich chose
12 to attack the Public Broadcasting Service, PBS, and
13 National Public Radio, NPR, as symbols of a bloated
14 inefficient bureaucracy, the communications arm of
15 lemon socialism. Speaking on a right wing cable
16 channel, Gingrich claimed that public broadcasting
17 'has been eating taxpayers money'. Gingrich and his
18 Republican foot soldiers not only declared the Public
19 Broadcasting System broken, but implied that even when
20 working properly, public broadcasting served no good
21 purpose. Americans, according to Gingrich, were
22 'paying taxes involuntarily to subsidize something

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1 which told them how to quote.'" Yes?

2 He felt that was important to lead the
3 book with that perspective, yes?

4 A Mr. Gingrich's perspective. This is my
5 summary of the position that Newt Gingrich took during
6 that period. I think it's a fair and accurate summary
7 of that position.

8 Q And you believed it an important
9 perspective on public broadcasting to put at the front
10 paragraph of this book?

11 A There was a feeling among many people in
12 public broadcasting and supporters of public
13 broadcasting during this period, by which I mean the
14 end of 1994, the early period of 1995, that they were
15 going to kill it, zero it out, to use Mr. Gingrich's
16 phrase and that as a dramatic moment seemed to me a
17 good way to start out the book with the possibility
18 that the thing might be killed by the newly emerging
19 Republican majority.

20 Q What incidentally is "lemon socialism"?

21 A Lemon socialism is a phrase that I believe
22 dates to the 1970s from British politics. It was a

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1 phrase used by the Tory party in England to lampoon,
2 if you will, the welfare state.

3 Q And when you make reference to a right
4 wing cable channel, to which cable channel were you
5 referring?

6 A It's called National Empowerment
7 Television or NET. It is owned by and run by people
8 who are affiliated with Paul Weyrich who is a well
9 known conservative fund raiser.

10 Q You appeared recently on a Charlie Rose
11 program, did you not?

12 A I did.

13 Q That happens to be broadcast on public
14 television, does it not?

15 A Yes.

16 Q And Mr. Rose, do you recall Mr. Rose on
17 that program suggesting that public broadcasting has
18 been attacked from both ends of the political spectrum
19 by the right for being too liberal, too attuned to
20 minorities and alternative lifestyles and from the
21 left for being too mainstream and commercialized?

22 A I do recall him saying that.

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1 Q Do you think that's an accurate
2 observation on his part, namely that public
3 broadcasting has been attacked from all flanks?

4 A Yes. Yes, I do. Where I would differ
5 from him, I think, is the way that he summarized his
6 position. On the other hand, when you have to speak
7 for television you can't always be as precise as you
8 might want to be, but yes, clearly public broadcasting
9 has been attacked from the left, right and center.

10 Q Now you fault in your book public
11 television for being too cowardly to properly support
12 its own controversial programming, do you not?

13 A I don't recall using the word "cowardly"
14 but that is approximately one of the theses of the
15 book, yes.

16 Q You cite as an example of that cowardice
17 that fewer than two dozen stations at one point aired
18 the pilot for a gay and lesbian variety show called
19 "In the Life" is that correct?

20 A That's right.

21 Q And you also indicated that, quoting from
22 189 of your book, the "controversy and cancellations

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1 which greeted gay themed programming represented
2 public television's own conservatism coming back to
3 haunt it." Is that correct?

4 A Uh-huh.

5 Q And you also go on in that same page to
6 indicate that then Senator Bob Dole was at the same
7 time complaining that public television was "hiding
8 behind Big Bird" while they "shovel out funding for
9 gay and lesbian shows." Correct?

10 A That's what Bob Dole said. I thought it
11 was a very dishonest statement on his part, given that
12 the program in question received absolutely no money
13 from the federal government or state government for
14 that matter.

15 Q And do you know a media critic named John
16 O'Connor?

17 A John O'Connor was the television critic
18 for the New York Times for many years, yes.

19 Q And I'm going to read you something he
20 wrote in February of 1985 and ask you if you remember
21 coming across with respect to this same program the
22 following observation by Mr. O'Connor. "With public

1 television needing all the success stories it can
2 muster these days, one of the more unlikely is being
3 provided by "In the Life" a monthly magazine devoted
4 to gay and lesbian issues and culture. It got off to
5 a tentative and unfocused start three years ago on
6 WNYC/Channel 31. Other stations in the system either
7 wouldn't touch it or scheduled it well outside prime
8 time. Now it is carried prominently by some 70
9 affiliates including major markets like Boston and
10 Dallas. Tonight at 10 it can be seen on WNET/Channel
11 13 immediately after as it happens, a profile of Rush
12 Limbaugh." Remember his commenting to that effect
13 about the "In the Life" program?

14 A I think I do.

15 Q And so from your perspective which was
16 that this program reflected in your words the
17 cowardice of public television and its unwillingness
18 to air it, arranging through Bob Dole's commentary
19 through Mr. O'Connor's, were you the only one right
20 and was everybody else wrong in your analysis?

21 A First of all, I don't see that the
22 statements are incompatible. Second of all, let me

1 ask you, have you seen the program in question?

2 Q I have not.

3 A Do you --

4 Q I'm not sure I'm here to answer your
5 questions, sir.

6 A Well, let me submit the following
7 possibility that -- and his is very common in the
8 history of public television, the program in question,
9 I think changed its approach considerably in reaction
10 to the outcry from people like Bob Dole and the
11 stations that wouldn't show it or would only show it
12 at 2 in the morning on Saturday and it is now, I mean
13 I happen to be good friends with the producer of the
14 program, John Scagliotti, and he would be the first to
15 tel you that it is no longer the same program that it
16 was when Bob Dole attacked it. It has a much more
17 mainstream approach. It avoids certain kinds of
18 controversies that it used to tackle. It has adopted
19 itself to the dictates of the stations which is very
20 often the pattern.

21 Q Would you agree with me that in the face
22 of a variety of criticisms from all quarters, public

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1 broadcasting remains popular with the American public?

2 A Definitely.

3 Q And so despite its critics it must be
4 doing something right, I take it, yes?

5 A It is serving an audience, yes.

6 Q Now, I believe you stated that the overall
7 purpose of your testimony was to provide a 20 year
8 look at changes which have occurred in public
9 television and public radio, is that correct?

10 A Yes.

11 Q Is it also not correct that most of those
12 changes have been occurring as you see it on an
13 evolutionary basis occurring over much of that 20 year
14 span, for example, the trending toward commercialism?

15 A Yes. Evolutionary is -- evolution itself
16 is a fairly controversial area, but I --

17 Q We're not talking Darwinism.

18 A I understand.

19 MR. SCHAEFFER: Why don't you let him
20 finish the answer.

21 THE WITNESS: I think there are models of
22 -- there are different models for evolution that are

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1 very controversial within Darwinian theory and I think
2 one that would illustrate the way that I would use
3 evolution to describe what's going on in public
4 broadcasting is called punctuated equilibrium which
5 means that you have a trend that kind of goes in one
6 direction and then there are certain watersheds that
7 push it to a different level. Among those watersheds
8 would be the ones that I talked about, the TCAF, the
9 liberalization of underwriting guidelines, obviously
10 the ascension of the Republican majority to the House
11 and Senate so that there are certain -- it's not a
12 straight line in other words. It sometimes spikes.

13 Q Let's talk about some of those spikes,
14 just to identify them on your time line. One of the
15 spikes according to your testimony and to your book
16 was the Nixon era reaction, is that correct?

17 A Absolutely.

18 Q Can you put a time line on that?

19 A Well, the Nixon Administration was in
20 office from January of 1969 to August of 1974. The
21 kind of systematic attacks and undermining that the
22 system received during that period are primarily

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1 traceable to the period of 1971, 1972, by 1973 and
2 1974 the Nixon White House had other concerns.

3 Q And so the movement, such that it has been
4 to look more to the private sector for funding, as you
5 testified, certainly was spiked by that time period,
6 correct?

7 A It definitely was.

8 Q And exacerbated by the Reagan
9 Administration's views?

10 A Can you ask the first part of the question
11 again? The movement toward corporate funding on a
12 large scale began in 1972, 1973. But then sort of
13 once they learned the steps to the dance, of
14 underwriting, they mastered it and began -- so if what
15 you're trying to say is did they stop doing corporate
16 underwriting until Reagan came in, the answer is no.
17 But if you're asking was it then sort of taken to a
18 different level, beginning in the 1980s, then I think
19 the answer is yes.

20 Q So it was taken to first a high level
21 beginning in the 1970s?

22 A Right.

1 Q And then a higher level in the 1980s?

2 A That's right.

3 Q And you cited the TCAF Report. Do you
4 remember what year that was issued?

5 A I believe it was 1981.

6 Q I believe it was 1983, but --

7 A Okay.

8 Q The record will reflect whatever it is.

9 A I think TCAF was probably founded in 1981
10 and issued its report in 1983.

11 Q Okay, and that was another watershed
12 event?

13 A Yes, connected with the FCC changed the
14 guidelines for underwriting beginning of 1984 to allow
15 for images that move, use of corporate logos and that
16 had a dramatic effect on the desire of corporations
17 then to come in and use the public television system
18 as a form of promotion.

19 Q And I take it those events that you write
20 about at length were events which were also covered
21 with some interest contemporaneously?

22 A Absolutely.

1 Q These were not hidden from public view?

2 A Oh no, no. I mean I don't know that they
3 were covered particularly well on public television,
4 but certainly in the Washington Post was writing
5 stories on a very regular basis during that time.

6 Q So by say 1987, let's say 1982 just to
7 pick a year --

8 A Okay.

9 Q There would have been no mystery in your
10 perspective as to the direction in which say public
11 television was going with respect to the
12 public/private funding, correct?

13 A It was there for anyone who chose to look
14 for it, yes.

15 Q And similarly say to pick a random year
16 1987?

17 A Yes.

18 Q And to pick another random year, say 1992?

19 A Yes. I mean it's a trend. By definition
20 a trend can be perceived at different points along the
21 line. There's a principle in sociology called the
22 tipping point where you have a system that is moving

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1 in a particular direction and then when it hits a
2 particular point it suddenly is something else.
3 Imagine like it goes from 49 to 51 and suddenly the
4 scales turn, and I think that what my book tries to do
5 is to illuminate the tipping points.

6 Q As you identified them in our colloquy in
7 the last few minutes, is that right?

8 A Yes.

9 Q Those were the key tipping points?

10 A I think. I mean I'm open to other
11 historical suggestions, but I think those are the
12 important ones.

13 Q I'm not here to do anything but ask you
14 questions, sir.

15 You see an important role for public
16 broadcasting in the United States, don't you?

17 A I very much do.

18 Q And a role which, if properly fulfilled,
19 can't be duplicated by commercial broadcasting?

20 A That is my belief and that was the belief
21 of the founders of the system.

22 Q And you don't believe that public

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1 broadcasting should be a clone of commercial
2 broadcasting?

3 A I do not.

4 Q Its mission is and should be different,
5 yes?

6 A Yes.

7 Q And the Public Broadcasting System which
8 you espouse is a strictly noncommercial system,
9 correct?

10 A Yes.

11 Q And others, as you yourself testified have
12 had a different view of that, for example, the TCAF
13 Report, correct?

14 A Indeed, and I would add the current
15 leadership of public broadcasting, yes.

16 Q Now, isn't a more accurate perhaps
17 characterization of the TCAF report then I believe you
18 may have supplied that, is that they fundamentally
19 suggested that enhanced underwriting, not outright
20 advertising, but enhanced underwriting which would
21 serve to further the mission of public television
22 might be a useful injection of important funding?

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1 A Yes, I mean that's certainly the position
2 that TCAF took and that's the position that many
3 people took. There's disagreement on this issue and
4 again, I think a lot of -- to some extent it's a
5 subjective judgment. If you allow for a few corporate
6 underwriting spots you can say that it's consistent
7 with the mission. But if you add them more and more
8 and they begin to take on the character more and more
9 of commercial advertising I think it's fair to say at
10 some point that a line has been crossed.

11 Q I'm going to show you a copy of what's the
12 denominated final report of the Temporary Commission
13 on Alternative Financing for Public Telecommunications
14 to make sure that this is the document that you and I
15 have been talking about.

16 A Okay.

17 MR. RICH: I would ask that this be marked
18 as our next hearing exhibit.

19 CHAIRPERSON GRIFFITH: It will be marked
20 PB Exhibit No. 12X.

21 (The document referred to was
22 marked for identification as

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Public Broadcasters Exhibit No.

12X.)

BY MR. RICH:

Q I'll ask you, Mr. Ledbetter, if you recognize this as what we've been referring to as the TCAF Report?

A I have not seen it in this form, but I take it from this labeling that that's what it is, yes.

MR. RICH: We would offer that in evidence.

MR. SCHAEFFER: No objection. It's very hard to read.

THE WITNESS: Yes.

MR. RICH: I'm not going to question you about it. I am going to ask you to flip to the third page.

CHAIRPERSON GRIFFITH: Let me note, there's no objection and it's received then as PB Exhibit 12X.

(The document referred to,
having been previously marked

1 for identification as Public
2 Broadcasters Exhibit No. 12X
3 was received in evidence.)

4 BY MR. RICH:

5 Q I'm just going to ask you to flip to the
6 third page. Do you see where it says "Members of the
7 Commission"?

8 A Uh-huh.

9 Q Can you read well enough simply the
10 listing of names?

11 A Yes, I can.

12 Q And affiliations.

13 A Yes.

14 Q That's all I'm going to ask you about.

15 A Do you want me to read them?

16 Q I just have one question.

17 A Okay.

18 Q Which is looking over that, do you have a
19 sense that the Commission was loaded with
20 self-interested people from the private sector looking
21 to inject commercialism into the medium?

22 A No, I do not have that impression and I

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1 don't -- just we're clear, I don't believe I've made
2 that argument.

3 Q Now funding the system you envisioned
4 poses quite a challenge, doesn't it?

5 A It does.

6 Q And you, in fact, devote some considerable
7 time and thought in your book to alternative funding
8 suggestions?

9 A Particularly in the final chapter yes.

10 Q As is, public broadcasting's budgets for
11 operations and program development are pretty
12 strapped, true?

13 A Using -- given the decisions that they've
14 made and given the way that the system is funded I can
15 see how they would argue that they're strapped, but I
16 think that again as I've been speaking all morning
17 about the amounts of money that are spent, I don't
18 know that that's necessarily the only way to look at
19 it.

20 Q Well, there are probably a lot of ways to
21 look at it, but I want to show you one way which you
22 apparently look at it. Look at page 4 of your book,

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1 please?

2 A Page 4?

3 Q Yes, the carryover paragraph at the bottom
4 of the page which says "public broadcasting's money
5 troubles should not be underestimated."

6 A Right.

7 Q "As is shown throughout the book, the
8 struggle for funds has hampered every incarnation of
9 public television and radio on every level:
10 producers, distributors, local stations. The hand to
11 mouth to screen existence is made more tense by the
12 strings that have become attached to every funding
13 source."

14 A Yes.

15 Q That was an accurate reading?

16 A Oh yes, can I read the next sentence?

17 Q Sure.

18 A "The sobering reality, however, is that if
19 the Corporation for Public Broadcasting and its
20 nationwide affiliates were funded at three or four
21 times current levels, a political pipe dream, the
22 system would still be hobbled by a host of

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1 contradictions that public broadcasting's chieftains
2 have refused for decades to resolve." And so again,
3 you can look at it in terms of being underfinanced and
4 I think that an argument can and should be made that
5 the system is underfinanced and ought to have more
6 capital. On the other hand, that doesn't mean that it
7 uses the capital that it has properly and it doesn't
8 mean that there aren't structural changes that
9 couldn't be introduced that would make the system much
10 more efficient. I think it's a very inefficient
11 system.

12 Q Let me ask you this, would you
13 characterize the typical commercial broadcaster as
14 living a "hand to mouth to screen" existence?

15 A It's been said that a television license
16 is a license to print money. They are given away by
17 the FCC for a song and certainly a lot -- the profit
18 margins are very high in commercial television
19 broadcasting.

20 On the other hand, networks are
21 financially strapped all the time. They lay off their
22 news divisions. They have to get infusions of capital

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1 from other places. They're always saying they're
2 financially strapped. And so I don't -- to hear
3 someone in the middle of a system sort of plead
4 poverty is really only to look at one piece of the
5 puzzle. But if what you're asking is do a lot of
6 television stations make money, the answer is yes.

7 Q By the networks being strapped, you're
8 referring to which networks now?

9 A It changes year to year, but there were
10 times in the 1980s when it looked like CBS was going
11 to go under.

12 Q Who is the current owner of CBS to your
13 knowledge?

14 A It's now Westinghouse.

15 Q Who is the current owner of ABC?

16 A Cap Cities/Disney.

17 Q Disney, is it not?

18 A Yes, Cap Cities/Disney is what I said.
19 Cap Cities.

20 Q Do you recognize that as one entity, Cap
21 Cities/Disney?

22 A It's one entity with several significant

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1 arms. Disney is the parent organization.

2 Q Disney is the parent organization?

3 A Yes, it is.

4 Q And who to your knowledge owns NBC?

5 A General Electric.

6 Q So at least with respect to the real world
7 economics of public television and commercial
8 television would you agree with me that whether or not
9 public television has been mismanaged, there are
10 significant differences, are there not, in the
11 economics of the two media?

12 A There are significant differences, and
13 there are significant differences in the way they're
14 structured.

15 Q Why do you suppose that talented producers
16 and other creators of program inputs for public
17 television, the people who you said re strapped
18 constantly in the quote we read from page 4 --

19 A Right.

20 Q Why do you suppose they participate in
21 public broadcasting projects that are so starved for
22 money?

1 A That's a very good question. I think that
2 a lot of them feel that there are still things that
3 you can do on public television that you can't do on
4 commercial television and I agree with that.

5 Q You also believe that there may be, as
6 corny as it might sound, psychic and other rewards,
7 creative independence?

8 A Yes.

9 Q That they obtain?

10 A I don't think that's corny at all. I
11 think that's very true. I think that's very true.
12 There remains within public broadcasting a kind of
13 calling, a sense of calling. I think that's true.

14 Q Do you have a view from your expert study
15 of this industry as to whether public broadcasting
16 today and over the next five years could sustain a
17 three fold increase in its overall program acquisition
18 expenses?

19 Let's stay with your billion dollars for
20 a minute. If next year they had to fund the same
21 programming schedule and shell out \$3 billion rather
22 than \$1 billion, do you think the system could sustain

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1 it, the system as you know it today?

2 A I think it would be a strain. That kind
3 of growth is unusual.

4 Q What do you think would be the impact on
5 the media?

6 A Presumably, they'd find a way to raise the
7 money. I mean they would simply have to fight harder,
8 probably, for more corporate dollars. The thing is I
9 don't -- it doesn't strike me as a very likely
10 scenario.

11 Q Now you've criticized public television's
12 programming fare for offering material that is
13 essentially redundant, I think that's the word you use
14 a bit in your book of what's available on commercial
15 TV, is that correct?

16 A Especially in comparison to cable. I mean
17 I think it's to a great cable television that has made
18 public television in some respects redundant.

19 Q Does cable to your knowledge reach every
20 American household?

21 A No, it does not.

22 Q What percent approximately of homes are

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1 wired for cable?

2 A I believe the current -- what they call
3 cable penetration is somewhere between two-thirds and
4 three quarters of American homes. I don't know the
5 precise figure off the top of my head, but it's in
6 that area.

7 Q So that even if we were accept for
8 argument sake your premise, then there would be some
9 significant body of American households not wired for
10 cable?

11 A That's correct.

12 Q Where public television would provide some
13 useful programming, correct?

14 A Absolutely. Absolutely, and that's one of
15 the reasons why I consider myself to continue to
16 support the idea of public broadcasting because there
17 are people who cannot or will not pay for cable
18 television.

19 Q Now you cited Lawrence Welk as an example
20 of the, I suppose either redundancy or lack of vision
21 or maybe some combination of public television, is
22 that correct?

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1 A Right.

2 Q And you also indicated you're familiar
3 with a publication called "Current"?

4 A Yes, I am.

5 Q You called it a very good magazine.

6 A Well, it's good. It's a trade
7 publication. It's a specialized publication. It's
8 not meant for the average reader, but I think it does
9 a good job of covering the industry and it offers a
10 wide variety of perspectives and it's a very important
11 news source for people who work in this industry.

12 Q I'll indicate to you and if you'd like to
13 see it I'll be pleased to show it to you that in one
14 of its issues, a current magazine, it had the
15 following to say about public television's resort to
16 the Lawrence Welk Show. "Public TV strongly attracts
17 the old and the young. In the evening, it has many
18 viewers in their 50s, 60s and 70s, because older
19 adults tend to take an interest in public affairs and
20 other informational programs. Some stations also
21 cater to older viewers, unwanted by the advertising on
22 commercial stations with programs like the Lawrence

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1 Welk Show reruns." Do you agree with that commentary?

2 A Partially.

3 Q Can you tell me who wrote that?

4 A Sure.

5 MR. RICH: I'll have this marked for
6 identification as well.

7 MR. SCHAEFFER: Why don't we put it in
8 evidence?

9 MR. RICH: Can we do that?

10 MR. SCHAEFFER: Yes.

11 MR. RICH: Thank you.

12 CHAIRPERSON GRIFFITH: All right, PB
13 Exhibit No. 13 will be received into evidence without
14 objection. 13X, excuse me.

15 (The document referred to, was
16 marked for identification as
17 Public Broadcasters Exhibit No.
18 13X and received in evidence.)

19 THE WITNESS: Yeah, this is from the web
20 page, Mr. Rich.

21 BY MR. RICH:

22 Q And also it's not -- I stand corrected,

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1 there is no date on it.

2 A There's no author here, so it's hard for me
3 to know whether or not this is the opinion of current
4 magazine. This could be an op ed. It's like judging
5 the opinions of the Washington Post by a single
6 columnist. I don't know who is speaking here.

7 Q Well, putting aside who is speaking, there
8 is a thought expressed here, is it not? Whether you
9 agree or disagree, the thought is expressed no matter
10 who the author is?

11 A I agree that commercial networks to an
12 extent do not serve elderly viewers in prime time. I
13 think that that's a fair statement.

14 Q Was is the essential demographic --

15 A May I finish my answer?

16 Q Yes.

17 A Thank you. The notion, however, that
18 catering to -- that's the phrase used here, catering
19 to viewers by showing them Lawrence Welk is to be
20 equated with serving viewers in the sense of public
21 television's mission, I have a great deal of trouble
22 with.

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1 Q What to your knowledge is the essential
2 demographic of the ABC, CBS, NBC and Fox Television
3 networks --

4 A For all shows?

5 Q What's the general target viewer audience
6 for prime time?

7 A Prime time tends, as they say the jargon
8 says tends to skew young which is to say 18 to 39 year
9 old viewers are highly prized among prime time
10 advertisers. However, prime time, because it is prime
11 time seeks to maximize audience, so they're not
12 programming specifically for young viewers, but I
13 think if the point you're trying to get at is that
14 sometimes networks don't serve elderly audiences well,
15 I agree with that.

16 Q Is there a current commercial market for
17 on commercial television for Lawrence Welk reruns, do
18 you know?

19 A I suspect there would be on cable
20 television.

21 Q You suspect or you know?

22 A I don't know. But I have a feeling if it

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1 is as popular with elderly viewers as this article
2 indicates there would certainly be a desire among
3 private cable broadcasters to show it, but I'm not
4 aware of any bidding war for Lawrence Welk.

5 Q Now you mentioned in your colloquy with
6 Mr. Schaeffer the News Hour with Jim Lehrer, yes?

7 A Yes.

8 Q Do you have an opinion as to that show,
9 quality of that show?

10 A I think it does some things very well and
11 I think that it chooses not to do other things.

12 Q As compared to say with the CBS Nightly
13 News, do you have an opinion of the quality of the
14 show? Less sound bitish perhaps?

15 A Is there a --

16 MR. SCHAEFFER: I'm rising to make an
17 objection. It seems to me we've gone a good long
18 time, but the witness is not presented to tell us
19 whether or not public television is good or bad. In
20 fact, at the outset of his opening, I said we were all
21 good guys. The issue here is really the
22 commercialization obviously. It seems to me that Mr.

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1 Rich is getting into a debate about the witness's more
2 or less political or other views really has nothing to
3 do with the price of tea in China and we've gone a
4 long way on that. I don't have any objection, it's
5 interesting to hear Mr. Ledbetter's general views on
6 life, but I don't really think it has anything to do
7 with what we presented. We presented this as not so
8 much a book, but tried to concentrate on the
9 commercialization and the analog between, for whatever
10 reasons, the analog between the two systems and I just
11 think that we've gone very far in this area, outside
12 the scope of what direct was.

13 CHAIRPERSON GRIFFITH: Are you objecting?

14 MR. SCHAEFFER: I am objecting.

15 CHAIRPERSON GRIFFITH: All right, thank
16 you. Mr. Rich?

17 MR. RICH: I'm almost speechless. I'm
18 quoting passages from either his testimony or his book
19 or his direct examination. Every single question
20 couldn't be tighter to the direct examination. I
21 don't know how else to respond. I'm speechless.

22 CHAIRPERSON GRIFFITH: The objection is

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1 overruled.

2 THE WITNESS: Could you ask your question
3 again?

4 BY MR. RICH:

5 Q As compared, say, with the CBS Evening
6 News with Dan Rather, how would you compare the depth
7 of subject matter treatment on the News Hour with Jim
8 Lehrer?

9 A I think that question is deceptively
10 simple. In other words, they play to different
11 strengths. CBS News is a genuine news gathering
12 operation. One of the functions of a news gathering
13 operation is to break news stories and to report in
14 original fashion material that's not reported
15 elsewhere in a timely way.

16 McNeil Lehrer -- it's now called the News
17 Hour with Jim Lehrer does not really have
18 correspondents who do that. They do some other
19 things, but they're different animals. I like some of
20 what I see on the News Hour with Jim Lehrer. I think
21 that it is not particularly a forum for diversity
22 which is supposedly one of public broadcasting's

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1 missions. I think that in its current incarnation it
2 is hobbled somewhat by its corporate sponsor. In my
3 book I deal particularly with their failure to do any
4 kind of in-depth reporting about the largest anti-
5 trust case in the history of the nation which is
6 against Archers Daniel Midland, the problem here being
7 that Archers Daniel Midland is the underwriter of the
8 News Hour with Jim Lehrer. So I mean I have -- if
9 what you're trying to say is is there some good
10 journalism on News Hour with Jim Lehrer, my answer is
11 yes.

12 I think a more apt comparison would be
13 with Night Line, frankly, because I think the programs
14 are more similar, but -- I mean, I don't know. I kind
15 of don't understand the point of a lot of your
16 questions.

17 Q And you can ask me to clarify them.

18 A Okay, CBS Evening News, I mean, also skews
19 old. I mean look at the people who advertise on CBS
20 Evening News, dentures and adult diapers. It's
21 clearly intended for an older audience, so it tends to
22 undermine the perspective I thought you were offering

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1 a moment ago that the networks don't serve older
2 viewers and that older viewers don't watch commercial
3 television. They clearly do.

4 I feel like you're trying to make a point
5 and I don't see what the point is.

6 Q I apologize. You can always ask me if you
7 don't understand my point. I do acknowledge that
8 public broadcasting does some things, yes?

9 A Absolutely.

10 Q In your book you've indicated that it has
11 had countless moments of excellence, yes?

12 A Absolutely.

13 Q You indicate that two generations of
14 children have learned to read, count and think with
15 Sesame Street, a program which you characterize as a
16 "model for educational television that is innovative,
17 multicultural and fun." Correct?

18 A Absolutely.

19 Q And that there are certain shows provided
20 by public television that "surpass anything that
21 commercial television could imagine", is that correct?

22 A Absolutely.

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1 Q Can you name one or two of those?

2 A Programs on public television that
3 surpass?

4 Q Yes.

5 A When I was writing that passage I was
6 thinking about some of the -- Bill Moyers' specials
7 form the 1980s, that's what I was thinking about. But
8 I think Frontline does occasional documentaries that
9 are fantastic. POB is another documentary series
10 which unfortunately only shows once a month and a lot
11 of stations don't carry it, but I think that it does
12 things that would never happen on certainly network
13 television.

14 Q Now you testified a bit about the
15 comparative production costs.

16 A Yes.

17 Q Respecting certain programs run on public
18 and commercial television, correct?

19 A Yes.

20 Q Did you do any kind of a thorough study of
21 this or was your testimony somewhat anecdotal in
22 nature?

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1 A I think it's fair to say that it is not,
2 that portion of the testimony is not a thorough study.

3 Q Let's talk about say documentary fare,
4 okay? Does the fact that PBS may pay more, say, or a
5 producer for PBS pay more for certain documentary
6 programs than say Arts and Entertainment might,
7 perhaps reflect a difference in the programs, the
8 products themselves?

9 A Not necessarily.

10 Q For example, if Arts and Entertainment
11 pays say \$150,000 an episode for Biography, the
12 program Biography, which runs at least five times a
13 week, is it not reasonable that the production values
14 associated with that program, the attention to factual
15 accuracy, the depth of research and everything else
16 are not as likely to be as complete as say a PBS
17 documentary which might, whose higher budget might
18 reflect that much greater depth of analysis?

19 A I think that's jumping to conclusions. I
20 don't think you can make that statement fairly without
21 specific examples.

22 The fact is that PBS and Arts and

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1 Entertainment are frequently competing for the same
2 programs that are produced by independent producers so
3 there's oftentimes no differentiation whatsoever in
4 the programming.

5 Biography, I don't know Biography to be a
6 particularly problematic show factually, and I could
7 cite a number of examples of documentaries that ran on
8 public television that did have factual problems,
9 Liberators being probably the most notorious example.
10 But I don't know why you would compare those things.
11 There are just too many differences to be able to say
12 that because they're spending more money at that
13 public television, they're necessarily going to
14 produce a better program. That's not the way
15 television works, unfortunately.

16 Q Every program has certain unique
17 attributes, yes?

18 A Yes.

19 Q Is it not hard to make a straight apples
20 to apples comparison --

21 A It is hard --

22 Q Say in production costs of Program X line

1 up against Y without looking at all of the production

2 --

3 A It is hard to make an apples to apples
4 comparison and that's why for purposes of my paper,
5 what I was trying to point out is not that PBS always
6 spends more money for documentaries than commercial.
7 I'm not making that argument. I'm simply saying that
8 the figures suggest that there is a great equivalence,
9 a comparability that they are at least competitive and
10 possibly more so, but I'm not saying that they always
11 spend more money or that they always get their money's
12 worth or that Arts and Entertainment doesn't get its
13 money's worth. I mean I'm not making those kinds of
14 generalizations.

15 Q And as you testified, you've made no
16 comprehensive study?

17 A It's not comprehensive.

18 Q I think for the record, it would be easier
19 if you let me complete my question before you answer,
20 otherwise we're going to lose part of the question.

21 A I apologize.

22 Q Now you believe public radio has achieved

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1 a number of the objectives you would seek for the
2 medium, correct?

3 A I think it's come closer, yes.

4 Q What do you see as its strong points?

5 A I think as a news gathering organization,
6 National Public Radio is quite good. In its mission
7 statement, actually, it's sort of a wonderful
8 document, it refers to NPR as having a journalistic
9 mode and a cultural mode. I'm not sure it does as
10 good a job on the cultural side as it does on the
11 journalistic side. I think it's wanting in that area
12 partly because of some financial problems it
13 experienced in the early to mid-1980s. And I think
14 that the range of cultural offerings on National
15 Public Radio is not as wide as might be suggested by,
16 as I say, the mission statement.

17 But certainly as a journalistic
18 enterprise, NPR I think is good. And the other thing
19 that I mentioned earlier that there are -- that
20 television and radio are different animals, and one of
21 the things that public radio does better than public
22 television is serving individual communities. It's

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1 easier to tailor the radio format to community needs
2 than it is to tailor the television format to
3 community needs. So in terms of specifically meeting
4 the needs for community programming, I think NPR
5 affiliates tend to do better than public television
6 stations.

7 If I can an example, WNET, the station in
8 New York has no programming about New York City which
9 I consider to be a travesty and a complete abdication
10 of its mission. It has no programming about --
11 specifically about New York City. It used to, but it
12 doesn't any more. The New York City public radio
13 affiliate, by contrast, has a large number of programs
14 devoted specifically to New York City and that
15 situation is also true in other cities to a greater or
16 lesser degree.

17 Just to sum up, journalistically and in
18 terms of serving community needs, I think public radio
19 does come a bit closer.

20 Q So that in contrast to your view that, for
21 example, public television programming tends to be a
22 clone of commercial television programming, you don't

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1 hold such an opinion comparing public radio to
2 commercial radio, do you?

3 A It's a good question. There's no cable
4 radio. In other words, cable has made the offerings
5 of television so diverse that it's sort of stolen some
6 of the thunder from public television. Nothing
7 comparable has occurred in radio. I mean arguably
8 radio has gotten more narrow in the last -- commercial
9 radio, has gotten more narrow in the last ten or 20
10 years and so given NPR more opportunities to
11 distinguish itself.

12 I think -- and I'm by no means alone in
13 making this observation, that NPR in the last five
14 years or so has become more and more like a mainstream
15 news organization and less and less of an alternative.
16 It looks better than commercial radio in part because
17 commercial radio journalistically is so deficient, but
18 I have a number of concerns about the
19 commercialization of NPR and the way that that affects
20 the choices that they make that are comparable to
21 those that I've expressed about public television.
22 Just one example that's in the book --

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1 MR. RICH: I think the witness is straying
2 a bit from my question, if I may?

3 CHAIRPERSON GRIFFITH: If you could answer
4 directly the question, sir. Thank you.

5 BY MR. RICH:

6 Q You're an avid listening to public radio,
7 aren't you, sir?

8 A I am.

9 Q Now, you testified a bit earlier to the
10 change over a 20 year period in the mix of funding for
11 public television, that is the percentages
12 attributable to public sector versus private sector
13 funding?

14 A Yes.

15 Q Did I correctly hear you testify that
16 roughly currently some 30 percent of PBS and public
17 television funding comes from the public sector? Was
18 that your figure?

19 A Public television, not PBS, but public
20 television as an entity, yes.

21 Q Do you happen to know what that figure is
22 if we were to bring in all tax-based revenue as

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1 opposed to nearly direct say CPB funding or direct
2 federal government funding?

3 A No, that is all tax-based revenue. The 30
4 percent figure includes state government, local
5 government, federal government, if that's what you
6 mean by tax-based revenue, that's inclusive in the 30
7 percent.

8 Q Are you certain about that figure?

9 A I'm certain that those are the figures
10 that were issued by CPB in its most recent booklet.

11 Q Well, that was the "Frequently Asked
12 Questions" booklet?

13 A Yes.

14 Q Can you tell me the categories from which
15 you derived the conclusion? Do you still have that
16 handy?

17 A Yes. Let me take one second to find it.

18 MR. SCHAEFFER: Page 7.

19 THE WITNESS: The 30 percent is rounded
20 off, I should say, but I believe what I did was I
21 added up state, CPB and local governments. I actually
22 -- it looks like it's probably slightly more than 30

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1 percent if you actually add up the figures.

2 BY MR. RICH:

3 Q Mr. Ledbetter, did you include state
4 colleges in that percentage?

5 A No, I did not.

6 Q Do you know whether that is not a source
7 of tax-based revenue for public television?

8 A It probably is. It probably is. Can I
9 just say about the 30 percent figure? The precise
10 figures are given in my written statement. The only
11 reason I use the 30 percent figure is because it was
12 roughly comparable in a sort of -- in a dramatic way,
13 I was just trying to catch the flavor. The 30 percent
14 is not a figure that -- if, in fact, the figure is 40
15 percent, I'd be happy to have the record reflect that,
16 but my point in making this argument was that the
17 system has changed from a primarily government funded
18 entity to what is now a primarily privately funded
19 entity.

20 Q Over a 20 year period?

21 A Over a 20 year period.

22 Q We'll get to the -- we need not burden you

1 with the details. We'll have experts on the numbers
2 testify about that.

3 As I think we've established, sir, the
4 involvement of corporate America with public
5 broadcasting is not a new phenomenon, correct?

6 A It is not a new phenomenon.

7 Q It dates back virtually to the inception
8 of the noncommercial broadcast medium in the 1950s,
9 true?

10 A That's correct.

11 Q In fact, is it also not true that private
12 industry help fund educational broadcasting even
13 before the federal government did?

14 A Yes, although it was primarily foundation
15 money, but there was some private money in those
16 efforts in the 1950s.

17 Q And by private money, what do you have in
18 mind?

19 A Well, I think there are some examples that
20 are given in the book. I mean for whatever reason
21 Allegheny Steel in Pittsburgh was a big funder of
22 educational broadcasting. Hills Brothers Coffee,

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1 General Motors, Kodak all provided some form of
2 backing for educational broadcasting in the 1950s.

3 What I have tried to -- I don't want to
4 stray.

5 Q The oil companies have had long
6 involvement in underwriting public television
7 programming, have they not?

8 A Yes, they have.

9 Q Mobil Oil, for example, has participated
10 in public broadcasting support dating back into the
11 1970s, true?

12 A That is correct.

13 Q Now, in your testimony, I believe at page
14 23, you suggest that today the distinction between
15 enhanced underwriting and the advertising is
16 "essentially moot."

17 Is that an accurate --

18 A Let me just find it. Yes. This is a
19 topic of great --

20 Q I haven't asked you a question.

21 A I'm sorry.

22 Q Other than is that correct?

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1 A Yes, that is what I wrote.

2 Q Now, by -- I take it that though that
3 distinction to the extent, as you see it, it has been
4 blurred or eliminated, dates back to 1984, is that
5 correct, to the FCC report?

6 A No. It's been building and 1984 was a
7 watershed, but it didn't come in all at once. I mean
8 for example, you mentioned Mobile a moment ago. It
9 was only recently that the program changed its name to
10 Mobil Masterpiece Theater from Masterpiece Theater.
11 That was only in the last couple of years. It's a
12 question of a gradual enhancement taking advantage of
13 what happened in 1984.

14 Q Let me ask you this, when, in your
15 estimation did PBS decide to allow full-fledged
16 commercials to run on public television?

17 A Let me just be clear on this. PBS does
18 not make that decision. PBS does not currently have
19 that as a policy. The entities that are really pushing
20 this are individual stations; WTTW in Chicago probably
21 at the cutting edge to the point where it got itself
22 in trouble with the FCC of running these full-fledged

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1 commercial spots.

2 KCET in Los Angeles, as I mentioned, is
3 also there.

4 Q Can you answer my question, please?

5 A Well, I did.

6 Q No, you're not. I'd appreciate it if
7 you'd answer me when in your estimation PBS, not the
8 stations, PBS decided to allow full-fledged
9 commercials to run on noncommercial television. What
10 year?

11 A I believe I have already answered that
12 programs that come through the national feed from PBS
13 do not carry with them commercial spots, as of now.
14 It could be that that decision, that that policy is
15 about to change, but my understanding, as of now, PBS
16 as an entity does not distribute its programs with
17 enhanced underwriting announcements attached.

18 Q Look at page 142 of your book, please.
19 Second full paragraph.

20 A Uh-huh.

21 Q "Promotion has been an especially
22 prominent underwriting agenda since the restrictions

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1 on advertising were loosened. The year that PBS
2 decided to allow full fledged commercials to run on
3 noncommercial television was appropriately enough
4 1984."

5 A On some stations, not on the national
6 feed. It did, they did run as part of the TCAF
7 experiment, they did run on some stations and PBS
8 signed off on that decision, but it did not -- I
9 assumed, if you're focusing on this, this is an issue
10 of some importance. PBS does not distribute its
11 programs on the national feed with commercial
12 enhancements. It doesn't do that.

13 Q And so your testimony about the medium,
14 the distinction between enhanced underwriting and
15 advertising becoming essentially moot is then limited
16 to the commercial insertions of individual stations
17 operating on their own initiative outside of PBS
18 guidelines?

19 A Well, yes, but the stations, as I
20 testified, are the producers of the programs. PBS is
21 not the producer of the programs, that's what counts.
22 People don't watch PBS. They watch a station, so when

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1 they see a commercial it's coming from the station.

2 Q Let's clarify this. When PBS distributes
3 programming on its national feed, is it your testimony
4 that PBS does or doesn't regulate the content of
5 whatever underwriting credits appear with the
6 programming?

7 A My understanding is that as of now, PBS
8 does not provide commercial attachments to the
9 programs it sends out on the hard feed, on the
10 national feed.

11 Q Is it your understanding that the stations
12 who produce, supply to PBS for national distribution
13 programming have unfettered discretion with respect to
14 that programming to do as they wish with commercial
15 enhancements?

16 A No, it is not. That's not my
17 understanding.

18 Q What is your understanding?

19 A Not unfettered. I mean -- can you ask the
20 question again, I'm not sure I fully grasp the
21 significance.

22 Q Focusing now not on productions at any

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1 given station in its own market may run, but rather
2 productions that are part of the PBS feed to stations,
3 all right, you are aware that underwriting credits are
4 associated with those programs?

5 A Yes.

6 Q To your knowledge, does PBS have a say in
7 the nature, content, format, duration, placement
8 etcetera of those announcements?

9 A Yes, I believe that it does have a role in
10 doing that, yes.

11 Q And as to focusing on those announcements,
12 is it still your testimony, looking at those forms of
13 enhanced underwriting announcements that those are no
14 different than full-fledged commercials on commercial
15 television?

16 A I'm sorry, can you ask that specific part
17 of the question again?

18 Q Yes.

19 A This is very precise and I want to answer
20 it correctly.

21 Q Yes, focusing on underwriting credits
22 associated with programming fed by PBS out through to

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1 its members as to the 1600 hours or so a year of such
2 programming?

3 A Right.

4 Q As to those underwriting credits, what is
5 your understanding as to what constraints are placed
6 on those credits?

7 A My understanding is that PBS does allow,
8 obviously, it allows underwriting credits. What it
9 does not allow is the full -- part of the problem here
10 is that these terms change, so people say this
11 particular spot is enhanced underwriting. There was
12 a fellow from the station in Houston who used the
13 phrase "super enhanced underwriting". The point that
14 I'm trying to make in my testimony is that these are
15 commercials. In every day parlance, these are
16 commercials. Anyone who sees them knows what their
17 purpose is and knows that they are very, very similar
18 to, if not in some cases, precisely the same, as those
19 that run on commercial television. To answer your
20 question, my understanding is that the current PBS
21 policy is not to allow the full 30 second spots that
22 some stations on the cutting edge of this promotional

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1 agenda are doing. Those, they can't, but other forms
2 of enhanced underwriting are allowed on the PBS
3 national --

4 Q Let me ask you this question, going back
5 to page 23 of your testimony, do you have it in front
6 of you, please?

7 A Uh-huh.

8 Q Is it your view that today the distinction
9 between advertising and the enhanced underwriting
10 permitted by PBS with respect to PBS fed programming
11 is essentially moot.

12 MR. SCHAEFFER: I jus want to object only
13 because that's not what it says.

14 THE WITNESS: That's not what it says.

15 MR. RICH: I'm asking for purposes of
16 clarifying what he meant here, whether that is one and
17 the same or different?

18 MR. SCHAEFFER: I object only because I
19 think he's confusing -- I don't mind him asking that
20 question, but that's not the subject of the sentence.

21 CHAIRPERSON GRIFFITH: It's a different
22 question.

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1 MR. SCHAEFFER: Yes.

2 BY MR. RICH:

3 Q Do you understand what I'm getting at? I
4 want to clarify what the scope of your intended
5 testimony in the sentence that appears in the middle
6 of page 23 as to which programming and to which
7 underwriting credits you were there referring. Why
8 don't you just tell us?

9 A I am referring to those that are seen by
10 most public television viewers which is to say the
11 spots come from the stations and when a viewer sees
12 those, that those full 30 second spots, call them
13 whatever you want, enhanced underwriting, super
14 enhanced underwriting, commercials, they are -- the
15 difference between those and the one that run on
16 commercial television is not an important distinction.
17 They are for all intents and purposes the same.

18 Does it come from PBS, the answer is no.
19 It doesn't come from PBS. I think I've answered that.

20 Q I don't think you've answered it, at least
21 to my understanding, I am not suggesting you're not
22 trying, but let's keep adding to it so we have a clear

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1 record here.

2 When programming is fed by PBS out to
3 member stations, do the enhanced underwriting credits
4 associated with that programming, in your estimation,
5 permit a station or permit a credit of 30 seconds in
6 duration?

7 MR. SCHAEFFER: I object to the form of
8 the question because I think the question is unclear.
9 I think that may be the problem.

10 THE WITNESS: I have to agree that the
11 question is unclear.

12 CHAIRPERSON GRIFFITH: Are you able to
13 answer the question as it was posed, sir?

14 THE WITNESS: I can't because I don't
15 understand it.

16 BY MR. RICH:

17 Q Let me try again. The underwriting
18 credits associated with PBS distributed programming,
19 I'm trying to ascertain your understanding -- was it
20 your intention to include such underwriting credits in
21 your statement appearing in the middle of page 23,
22 namely that they are so analogous --

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1 A No. The answer to that is no and I think
2 that's clear from the context. Look at the sentence
3 that comes before. "Not surprisingly then,
4 underwriters seeking to get the maximum message for
5 their expense have leaned on PBS." That to me
6 indicates that PBS does not yet do this, but they do
7 -- they are only one step behind the stations is the
8 point that I'm trying to make. The stations, many of
9 the stations, especially the larger stations, have
10 gone to the full 30-second spots and the consensus
11 within the industry is that that is the direction that
12 the entire thing is going to go to. When PBS decides
13 to jump on board is, in my view, merely a question of
14 time. It sill happen.

15 Q What is the basis for your so-called
16 expert opinion on that issue? What is the source of
17 your knowledge as to PBS being just a step behind?

18 A I think it comes from both articles that
19 have appeared in the trade publications and from my
20 interviews with people who work in public television.

21 Q Can you identify each of those people who
22 told you that it is only a matter of short matter of

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1 time until PBS follows suit with local stations in
2 respect of underwriting credits practices?

3 A I can, but I don't know that I have to.
4 I mean I'm a journalist. I have conversations every
5 day with people who work in media and they form the
6 bases by expertise. I don't -- aside from -- if you
7 would like to me, after this is over, produce a series
8 of articles that have run in Current and in Public
9 Broadcasting Report that would support the opinion
10 that PBS is likely to join in with the stations in
11 allowing full 30 second spots, I would be happy to do
12 so. I would point out to you that footnote 41 from
13 the article in Current, February 1997, this is the
14 headline of the article, "The Question of Length is
15 Really Settled." That is most people in the industry
16 have accepted the 30 second spot as the coin of the
17 realm. It seems to me likely that PBS will likely do
18 so since it is owned by the stations anyway and it's
19 not so much that's going on within PBS that's really
20 fighting this trend. It seems to me very likely that
21 they will accept it.

22 Q Isn't that speculation on your part?

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1 A It is speculation because it hasn't
2 happened yet, yes.

3 Q Thank you. Are you familiar with the PBS
4 National Program Funding Standards and Practices,
5 dated February 2, 1997?

6 A That particular one, I don't know that I
7 am.

8 Q I'll represent to you that that's the
9 latest iteration of the underwriting guidelines.

10 A Is it? I think there might have been one
11 subsequent to that.

12 Q I believe that is the most recent.

13 A February 1997. I have a recollection of
14 some tweaking that was done in the middle of 1997, but
15 it might have been just a new interpretation that then
16 became sort of precedent.

17 Q Do you make a practice of following and
18 understanding the nature of those guidelines?

19 A Yes, I do.

20 Q Do you have any reason to believe that
21 with respect to PBS originated and distributed
22 programming, those guidelines are not attempted to be

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1 complied with in good faith?

2 A Yes. I think the answer is yes. I have
3 a huge problem with the way PBS enforces its
4 underwriting guidelines. Huge problem. I think at
5 this point they might as well throw them out the
6 window. I mean I think the salient example being the
7 documentary that they refused to distribute on the
8 grounds that it was funded in part by labor unions.
9 I found that to be an incredible double standard and
10 I told the PBS spokesman so and I said are you saying
11 that labor unions can never fund a program on public
12 television that deals with work place issues, even
13 though investment banks fund programs that deal with
14 business and he said yes, I am saying that. That
15 seems to me to be a double standard. So I don't think
16 that those standards have ever been consistently
17 applied. It's a big problem.

18 Q And this is also based on your off the
19 record interviews, off the record sources?

20 A This is an on the record interview with
21 Barry Chase, the New York publicist for PBS. He's the
22 one who told me that and I provided him with a number

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1 of examples.

2 Q What is it he told you exactly?

3 A In his opinion, labor unions would never
4 be allowed to fund a program that would be distributed
5 by PBS if that program dealt with work place issues.
6 I'm not talking about full funding, I'm just saying
7 they provided maybe 20 or 30 percent of the funding of
8 this. The documentary is called "Out at Work" and it
9 was supposed to be distributed through POV. It has
10 been accepted by POV and then was sent to PBS for
11 approval. PBS rejected it and invoked one of the
12 recent underwriting guidelines and the double standard
13 seems plain to me. I asked Mr. Chase to provide me
14 with an explanation that would resolve that double
15 standard and he was not able to do so.

16 MR. RICH: We have a ways to go.

17 CHAIRPERSON GRIFFITH: Okay, we'll take
18 our luncheon recess.

19 MR. SCHAEFFER: We may -- notwithstanding
20 my previous optimism, I'd like to know how much longer
21 Mr. Rich has because I have three witnesses who are
22 kind of waiting in the wings and it seems to me it's

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1 not going to -- if we keep on with this, if this is
2 the rate, then we're not going to be able to finish by
3 Friday by any stretch.

4 MR. RICH: I can't project the witnesses
5 giving long, narrative answers to very direct
6 questions. I'm not stopping him. He's entitled to,
7 but it's going much longer than I would have guessed
8 because of the nature of the witness's responses.

9 THE COURT: We'll take our luncheon recess
10 and return at 2 o'clock, please.

11 (Whereupon, at 1:03 p.m., the hearing was
12 recessed, to reconvene at 2:00 p.m., Thursday, March
13 12, 1998.)
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1 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2 (2:04 p.m.)

3 CHAIRPERSON GRIFFITH: Mr. Schaeffer,
4 before we begin -- or, Mr. Rich, before you begin,
5 Judge Gulin has just reminded me, could you get us a
6 written statement of the witnesses that you are
7 withdrawing?

8 MR. SCHAEFFER: Yes, of course.

9 CHAIRPERSON GRIFFITH: Because if we go
10 back and try to look through --

11 MR. SCHAEFFER: Yes, we've got those.
12 Yes.

13 CHAIRPERSON GRIFFITH: -- the transcript,
14 we'll never find it.

15 MR. SCHAEFFER: Yes.

16 CHAIRPERSON GRIFFITH: Looking for that
17 particular thing.

18 MR. SCHAEFFER: Yes. It's Bander and the
19 other guy, Schwind. But yes --

20 CHAIRPERSON GRIFFITH: Schwind.

21 MR. SCHAEFFER: -- in fact, we'll send a
22 letter --

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1 CHAIRPERSON GRIFFITH: Great. Thank you.

2 MR. SCHAEFFER: -- that I am withdrawing
3 it. Will that be --

4 JUDGE GULIN: And the documents underlying
5 it.

6 MR. SCHAEFFER: That's right.

7 CHAIRPERSON GRIFFITH: Okay.

8 MR. RICH: Your Honor, as I have
9 distributed to counsel and to the Panel -- Phil, right
10 here for you -- a copy of the FCC 1984 order, which
11 has been referred to periodically in this witness'
12 testimony, I would offer as a hearing exhibit if there
13 is no objection at this point in time.

14 MR. SCHAEFFER: It is a public record. I
15 can't object to that.

16 CHAIRPERSON GRIFFITH: All right. It is
17 PB Exhibit 14X, and it will be received without
18 objection.

19 (Whereupon, the above-referred
20 to document was marked as PB
21 Exhibit No. 14X for
22 identification, and was

1 received into evidence.)

2 MR. RICH: Thank you.

3 CROSS EXAMINATION (continued)

4 BY MR. RICH:

5 Q Mr. Ledbetter, I believe in your direct
6 testimony you referred to WTTW as having been
7 sanctioned by the FCC for its underwriting practices?

8 A That's correct.

9 Q Sir, are you familiar enough with the 1984
10 order which I have placed in front of you to know
11 whether it would have been pursuant to this authority
12 that the FCC acted?

13 A Without having recently looked at the full
14 details, I can't say for sure, but it makes sense that
15 it would be.

16 Q As a general matter, I --

17 A As a general matter, yes.

18 Q -- I take it you are aware that the FCC
19 does have this enforcement authority?

20 A Oh, yes. Yes.

21 Q And it does periodically exercise it?

22 A Oh, yes.

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1 Q Are you aware of any comparable FCC
2 guidelines regulating advertising on the commercial
3 broadcasting side of the spectrum?

4 A They exist.

5 Q Can you identify them for me?

6 A I couldn't give you the --

7 Q Not by citation.

8 A Yeah.

9 Q But what do --

10 A They just --

11 Q -- they claim to regulate?

12 A Well, for example, the number of minutes
13 per hour is regulated that advertising may be shown.
14 I believe that there is some regulatory overlap,
15 because the FTC also regulates advertising in this
16 area with regards to false claims and things of that
17 nature. But they do -- the FCC does have authority in
18 that area.

19 Q Say in your typical prime time programming
20 fare and commercial as opposed --

21 A Right.

22 Q -- to public television, do you have an

1 understanding whether the FCC claims to regulate the
2 content of the advertising that is shown?

3 A I don't believe that they do regulate the
4 content of it, no.

5 Q Now, you mentioned a number of --

6 A With one exception, and that would be with
7 political advertising. They do regulate political
8 advertising in --

9 Q But as to how the product or service --

10 A Yeah.

11 Q -- is otherwise advertised, there is no
12 comparable set of limitations?

13 A That is correct.

14 Q What is your understanding, say, in prime
15 time about the number of minutes that an NBC or an ABC
16 television network will run in a given hour --

17 A I --

18 Q -- of commercial -- of non-program time?

19 A Without precision, I believe it is 14
20 minutes per hour.

21 Q And do you know the comparable limit on
22 PBS-distributed programming of non-program time?

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1 A I do not know the precise number.

2 Q Does three minutes sound about right?

3 A Yes, it would be definitely lower. And if
4 I remember correctly, that was one of the problems
5 that WTTW had. It is not the first time that that
6 issue has been raised, but it is one of the more
7 recent ones.

8 Q Before the lunch break, you testified
9 about a growing trend of expanding commercialism as
10 practiced by the public television stations, yes?

11 A Yes.

12 Q How broad a survey of that practice or
13 tendency do you take in among the 350 or so local
14 television stations -- public television stations?

15 A Well, again, as I testified earlier, the
16 vast majority of those stations don't produce any
17 programming for the national system, so you wouldn't
18 need to survey them. I have looked principally at the
19 policies of the 10 or 15 largest stations that really
20 make up the vast majority of the national schedule.

21 Q So going down to the balance, the 300 and
22 some remaining stations, do you have any similar

1 understanding about the degree to which their own
2 underwriting practices have changed in the last five,
3 10, 15, or 20 years?

4 A The general pattern holds that they tend
5 to run more and more commercial activity. They tend
6 to seek out corporate funding as a larger percentage
7 of their budget today than they did, say, 20 years
8 ago. That, as a general proposition, holds.

9 Q But you have not -- for purposes of the
10 testimony you have submitted here, and have testified
11 about, you have not examined, for example, a station
12 like KRIN in Waterloo, Iowa, or --

13 A I have --

14 Q -- an equivalent, for their practices?

15 A I have not. I have not.

16 Q Now, also, when you testified to the, for
17 example, increasing merchandising practices of
18 stations such as WGBH, I take it they are not typical
19 of balance of the smaller stations in terms of those
20 kinds of expanding activities either, is that true?

21 A No, I wouldn't say that. I think that
22 because of their size they are atypical. But in terms

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1 of the activities, it is across the board. In my
2 book, I talk about KVIE in Sacramento, which gives its
3 members a gold card that gets them discounts in
4 stores. You know, something like 10,000 of their
5 viewers have these cards.

6 There are a number of -- and it varies
7 from station to station. I also discuss in the
8 testimony I believe it's WGBU in Grand Rapids, which
9 is leasing out its broadcast facilities for private,
10 closed circuit broadcasts that constitute something
11 like four percent of the annual revenues.

12 There are a variety of entrepreneurial
13 activity, the precise makeup of which obviously varies
14 from station to station, but I think it is entirely
15 fair to say that as a trend this is on the increase.

16 Q I take it, in any event, you would agree
17 that these are non-broadcast revenues -- that is, the
18 revenues directed to merchandising income, to music
19 labels, to PBS books, to PBS video -- these are other
20 initiatives beyond broadcast or --

21 A For the most part, yes. I don't know
22 where I would put leasing out of broadcast facilities

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1 for -- for -- I don't know where you would categorize
2 that. But, I mean, as the testimony indicates, the
3 CPB does exclude these kinds of entrepreneurial income
4 from the rest of the expenditures and income that they
5 break down. They have a separate category for it.

6 Q You agree, do you not, that over the past
7 20 or so years public television's audience share has
8 remained constant at about two percent of viewership?

9 A Nationally, that is true.

10 Q Nationally.

11 A That is true. I was at a conference last
12 weekend where people were throwing around the figure
13 2.5, but it has certainly not, you know, doubled or
14 tripled the way that the overall viewership has.

15 Q Now, at page 12 of your written testimony,
16 if you don't mind, and in response to examination by
17 Mr. Schaeffer, you speculate as to the level of
18 dollars spent systemwide on television programming by
19 public television. I believe you guesstimate a
20 billion dollars or so a year?

21 A Yes. It's an estimate.

22 Q And as you testified candidly in response

1 to Mr. Schaeffer, you said the numbers, from your
2 standpoint, were hard to come by?

3 A They are hard to come by. They are hard
4 to come by.

5 Q Now --

6 A It could be -- it could be more; it could
7 be less.

8 Q Have you had occasion to review PBS's and
9 NPR's direct submission in this case in which the
10 actual number for television, namely \$675 million, is
11 provided --

12 A I --

13 Q -- as PBS Exhibit 6?

14 A I reviewed some of that material, I
15 believe it was in October, and for some reason the
16 figure of \$800 million stands out in my mind. Perhaps
17 that was combined television and radio. I don't -- I
18 don't know.

19 Q I believe you're right. For the moment,
20 I'm comparing your \$1 billion television to the \$675
21 million of the \$800 million, which is for public
22 television, correct.

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1 A I did see that.

2 Q My question is: do you have any basis for
3 challenging the accuracy of that number?

4 A I don't have a basis for challenging it.
5 It was -- if I can just say that -- clearly, that
6 material was not available to me prior to the
7 preparation of this testimony, and it is not -- it is
8 not a figure that, outside of this proceeding, I have
9 ever seen isolated in that way. So without having
10 combed through the specifics, I don't have a reason to
11 challenge it.

12 Q Now, I take it you are not here
13 testifying, Mr. Ledbetter, as to the reasonableness of
14 the music license fees sought by ASCAP in this case,
15 correct?

16 A I am not. I am not. That is outside the
17 field of what I consider to be my expertise.

18 Q Yes.

19 MR. RICH: I have no further questions.

20 MR. SCHAEFFER: I just have one or two --
21 one comment. We don't have enough copies here, but
22 there have been so many comments addressed to Mr.

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1 Ledbetter's book, and we have several copies back at
2 White & Case. So I would ask for the opportunity to
3 submit to each of the Arbitrators a full copy of the
4 book and bring it up at the next session. Having gone
5 through the book, it is only fair that the entirety of
6 the book be presented, I think.

7 CHAIRPERSON GRIFFITH: Any objection, Mr.
8 Rich?

9 MR. RICH: I'd like to consult for one
10 moment.

11 CHAIRPERSON GRIFFITH: All right.

12 MR. RICH: We have no objection.

13 CHAIRPERSON GRIFFITH: All right.

14 MR. SCHAEFFER: I'll furnish those
15 tomorrow.

16 CHAIRPERSON GRIFFITH: I've got to come up
17 with a number. That will be your --

18 MR. SCHAEFFER: That's the first cross
19 examination exhibit of ours, so --

20 CHAIRPERSON GRIFFITH: Cross examination?

21 MR. SCHAEFFER: Well, a supplemental
22 exhibit.

1 JUDGE GULIN: It's a hearing --

2 MR. SCHAEFFER: Yes.

3 JUDGE GULIN: We'll call it hearing --

4 MR. SCHAEFFER: Do you want to call it a
5 hearing exhibit?

6 JUDGE GULIN: That will be ASCAP Hearing
7 Exhibit 1.

8 CHAIRPERSON GRIFFITH: Hearing Exhibit 1.

9 MR. SCHAEFFER: Let me just make a note of
10 that, and I just have a couple more questions.

11 REDIRECT EXAMINATION

12 BY MR. SCHAEFFER:

13 Q Mr. Ledbetter, you had begun to testify --
14 and I believe properly Mr. Rich cut you off -- as to
15 your concerns re the commercialization of NPR.

16 A Uh-huh.

17 Q Do you recall that? Would you tell us
18 what those concerns are?

19 A Yes. Like public television, public radio
20 has moved more and more toward a system of corporate
21 underwriting, and there are many people, particularly
22 within the journalistic profession, who feel that in

1 some areas they have really crossed the line.

2 As I say, the one that I would really
3 point to is a practice that NPR does that -- I am not
4 aware of another journalistic organization in the
5 entire United States that does this. That is, that
6 you can -- they will -- they will take money in the
7 form of a grant to produce stories on a particular
8 subject, so that the foundation -- say, the United
9 States-Japan Foundation, for example, might provide a
10 \$50,000 grant for NPR to produce stories related to
11 the United States-Japanese relations.

12 As I say, this is not a common practice in
13 the United States. As an employee of the Village
14 Voice, if I took a grant really of any size to produce
15 a story on a particular topic, I would be fired
16 immediately. In fact, it has happened at my paper.
17 But it is -- and we're not talking about a small
18 amount of money. I mean, in the mid 1990s, it was
19 estimated that approximately one-third of the news
20 programming budget of NPR comes from this arrangement.

21 Having said that, to be completely fair --
22 and I make this point in the book -- some of the

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1 stories that are produced in that -- in that method
2 are very good stories and stand up to all sorts of
3 journalistic tests. So I'm not saying that it's an
4 intrinsically biased situation, but it is -- it raises
5 disturbing questions of journalistic ethics, and it is
6 a topic of some controversy, both within public radio
7 and in journalism schools.

8 But beyond that, there are other examples
9 of -- there's a public radio program called
10 Marketplace that is underwritten, in part, by General
11 Electric. And it has a theme song, and as it sort of
12 crescendos, it merges into the General Electric theme
13 song We Bring Good Things to Light. It plays those
14 notes the same as they're played on commercial
15 broadcasting.

16 There are a lot of listeners to public
17 radio who really chafe at those kinds of intrusions.
18 It is almost subliminal in the way that it happens,
19 and it suggests a relationship between General
20 Electric and public radio, which is one that is not
21 one of complete independence. So those are the kinds
22 of concerns.

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1 In addition, NPR, like PBS, has gotten
2 into the -- sort of the marketing and merchandising
3 business. And again, my concern there, as always, is
4 if you reach a point where a good percentage of your
5 income is coming from merchandising, inevitably you
6 will choose your programs according to what is
7 merchandisable, and it will be harder and harder to
8 get on the air the kinds of programs that don't lend
9 themselves so easily to merchandising -- the very
10 commercial trap that made the system necessary in the
11 first place.

12 Q Finally, some questioning went on about
13 The Lawrence Welk Show. Do you happen to know what
14 the format of The Lawrence Welk Show is?

15 A It's a variety program -- you know, music
16 and sketches.

17 MR. SCHAEFFER: No further questions.

18 MR. RICH: One or two on --

19 CHAIRPERSON GRIFFITH: All right.

20 MR. RICH: -- redirect, please.

21 RE CROSS EXAMINATION

22 BY MR. RICH: .

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1 Q I take it you would agree, Mr. Ledbetter,
2 that there is a limit to the tolerance of public
3 television viewers and NPR and public radio listeners
4 to overcommercialism on the medium?

5 A There is, and the CPB has actually
6 commissioned viewer surveys on this topic. It's a
7 very interesting area.

8 Q In a sense, that will be or should serve
9 as a brake on any excesses over a long period of time,
10 should it not?

11 A Not -- not given the dynamic changes in
12 the audience, because theoretically they could -- they
13 could -- they could expand into viewers or listeners
14 who are not currently there, and then drop off, say,
15 the 30 percent who are offended by these things. And
16 so the audience, particularly in the period that we're
17 discussing, is a dynamic one. It's not a static one.
18 So I wouldn't -- I wouldn't make that assumption.

19 Q To your knowledge, today, as opposed to
20 theoretically in the future, what is the largest
21 single source of funding for public television?

22 A It is viewer dollars.

1 Q And what is the largest single source of
2 funding for public radio?

3 A I believe it is membership dollars.

4 MR. RICH: I have no further questions.

5 MR. SCHAEFFER: No questions.

6 CHAIRPERSON GRIFFITH: All right. May
7 this witness be excused?

8 Thank you. You may step down, sir. You
9 are free to go.

10 (Whereupon, the witness was excused.)

11 MR. SCHAEFFER: Our next witness is Mr.
12 Saltzman, and the interrogation will be conducted by
13 my colleague, Ms. Beverly Willett.

14 CHAIRPERSON GRIFFITH: Mr. Saltzman, if
15 you will raise your right hand to be sworn, please,
16 sir.

17 WHEREUPON,

18 SETH SALTZMAN
19 was called as a witness by Counsel for ASCAP and,
20 having been first duly sworn, assumed the witness
21 stand, was examined and testified as follows:

22 DIRECT EXAMINATION

1 BY MS. WILLETT:

2 Q Would you state your full name for the
3 record?

4 A Seth Saltzman.

5 Q And who are you employed by, Mr. Saltzman?

6 A ASCAP.

7 Q And your position at ASCAP?

8 A My position is Director of Performances,
9 which is part of the Distribution Division of ASCAP,
10 distribution of royalties. I am in charge of the
11 areas of ASCAP that identify music in ASCAP's surveys.

12 Q And how long have you been with ASCAP?

13 A Since 1984.

14 Q In addition to your duties as Director of
15 Performances, have you served in other capacities in
16 the past and the present in the music entertainment
17 field?

18 A Yes. I'm a musician, a pianist, a
19 conductor, musical director. I've played 50 or 60
20 shows as a musical director. I've acted as a music
21 consultant for a number of films and TV projects in
22 the last 10 years, including a film about Thomas

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1 Jefferson that is used at the Monticello museum in
2 honor of Thomas Jefferson. It's the film that they
3 play 12 times a day. It rolls every 40 minutes, and
4 I was the musical consultant on that.

5 I was the musical consultant for The New
6 York Times on the history project which had a few
7 films, one of which showed on public television
8 actually -- a film about James Reston -- a number of
9 years ago.

10 Q And could you just describe briefly for
11 the Panel this afternoon the purpose of your
12 testimony?

13 A The purpose of my testimony is to really
14 show the wide range of uses of music on public
15 television, and the way that music is used, and also
16 the wide diversity of the types of music, the genres
17 of music, all genres of music virtually used on PBS in
18 all sorts of different ways.

19 Q Can you give the Panel some examples of
20 some of the genres of music you're talking about?

21 A Rock, popular music, standard music,
22 Broadway show tunes, country music, folk music,

1 ballet, classical music.

2 Q Could you describe for the Panel -- you
3 mentioned the ranges of ways in which ASCAP music is
4 used. Could you just enumerate briefly some of the
5 ranges of ways in which ASCAP music is used?

6 A Yes. Music is used -- ASCAP music is used
7 as theme music leading in and out of programs. It is
8 used as features on programs where a full song is
9 actually performed. It is used as background music
10 where it is actually -- the actual background dramatic
11 score for a movie or a series, an episode. Those are
12 some of the uses.

13 Q And in your testimony, did you compile
14 some examples of some of these ranges in which -- ways
15 in which music is used -- ASCAP music is used on
16 public television?

17 A Yes.

18 Q In compiling these examples, let me just
19 ask you at the outset, did you undertake or conduct
20 some sort of study or scientific sample or attempt to
21 quantify all of the different ways in which ASCAP
22 music is used? All of the different examples?

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1 A No. Really, just took a look at a wide
2 range of programming on PBS to see what was being used
3 and how it was used. But no, not scientific. It was
4 more or less looking at TV Guide broadcast schedules
5 to see what was on, and then looking at the music use,
6 and then figuring out the different ways it was used,
7 but nothing more scientific than that.

8 Q Okay. Let's go through each of these ways
9 in which ASCAP music is used on public television that
10 are set forth in your direct testimony. Let's take --
11 I'm looking, if you're following along, at about
12 paragraph 6. Let's take features first. If you could
13 just describe for the Panel first what is a feature,
14 and then tell the Panel the ways in which ASCAP
15 feature music is used on public television.

16 A Sure. A feature is really a piece of
17 music that -- it is what it says, it's a feature. It
18 is the primary focus of the audience at that moment.
19 It may be a partial performance of a song or a full
20 performance of a song.

21 An example would be I guess Sammy Davis,
22 Jr. or James Taylor on Evening at Pops where they are

1 introduced and Sammy Davis, Jr. will come out and sing
2 Mr. Bojangles, the entire song, start to finish, or
3 James Taylor will come out and sing Sweet Baby James
4 or any of his big hits from the Fire and Rain -- from
5 start to finish, a full feature with audiences
6 actually looking and listening to the whole song.
7 Their focus of attention is directed at that piece of
8 music.

9 Q And what are some of the actual features
10 on music programs that you have found when you took a
11 look at the programming?

12 A Well, some of the things that we actually
13 found -- for features?

14 Q Yes.

15 A Things like Johnny Mathis singing Moon
16 River on a show about Johnny Mercer, an evening of
17 Johnny Mercer music, Johnny Mathis straight on camera
18 on -- a full orchestra behind him singing Moon River,
19 examples of singers on a cabaret show on Channel 13,
20 which is WNET New York, singing My Favorite Things
21 from start to finish, shows like I guess Marsalis on
22 Music, which is the Wynton Marsalis show where he is

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1 actually performing full pieces of his music. Those
2 are examples of some of the features.

3 Q And in terms of new music programs that
4 are on public television -- I'm looking now at some of
5 the things that you are describing in paragraph 10 --
6 would you describe some of those shows --

7 A Sure.

8 Q -- for the Panel?

9 A Yes. A new program came out recently --
10 it's called Sessions at West 54th Street -- which is
11 truly a musical show, the word "session" being a
12 musical session. The whole focus of the show is a
13 featured artist, or maybe two or three featured
14 artists during the show, such as the last few years,
15 as I have written down here, Wynton Marsalis, Ricki
16 Lee Jones, Suzanne Vega. It's actually the program --
17 the audience is sitting in the round -- around the
18 artist, and it's pretty solid wall-to-wall music.

19 And maybe they break once in a while for
20 the artist to actually explain a little bit about this
21 new album that they're putting out or some of the work
22 that they have been involved with. But it's really

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1 heavily focused on music. It's a good title for the
2 show, Sessions on West 54th Street.

3 Another show would be I guess Austin City
4 Limits, which is a very popular -- very popular
5 program, usually featuring more folk country artists,
6 such as Mary Chapin Carpenter, Lyle Lovett. And also,
7 it's a little more traditional where the performers
8 are on a stage in front of the audience, and the
9 audience is more facing the performance. It's a
10 different focus. That's another example of a new show
11 -- fairly new show on PBS.

12 Q Now, let's just turn for a moment to ASCAP
13 music as uses as themes in connection with some of the
14 programs on public television. Could you just tell
15 us, what is a theme?

16 A A theme is a piece of music used to
17 identify a program, a personality. A theme is used --
18 of course, the most obvious use of themes are at the
19 beginning of a show, leading into the program, and at
20 the end of the program leading you out of the program.

21 Certainly, a theme is something I think the
22 creative people on the show would certainly design the

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1 theme to be something that really brands the show. So
2 when you hear the theme, you come running out the
3 kitchen, put the snack back down and -- because you
4 know that this show is on or that show is on. So it's
5 a real identifier. Themes can be used throughout
6 shows also to identify a personality.

7 Q And did you compile some examples of ASCAP
8 themes that are used on public television?

9 A Yes, I did.

10 Q And the results of that are set forth in
11 ASCAP Exhibit 200?

12 A Yes.

13 MS. WILLETT: I could give another copy to
14 the Panel if it's easier for you to look at or --

15 THE WITNESS: Okay. After the header
16 page, we have four pages of different types of
17 programs that use themes. So looking at the very
18 first page, after the header --

19 BY MS. WILLETT:

20 Q Could we just go back one moment and
21 just -- you categorized these themes?

22 A Yes.

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1 Q In some loose categories that are shown on
2 the first page of the exhibit?

3 A Yes. On the first page, you will see
4 different categories to show the wide use of programs
5 that use ASCAP themes. Letter A, children's
6 programming; letter B, news and current program
7 themes; C, how to shows, such as This Old House,
8 cooking shows; and D, prime time family programs,
9 things that run in the evening from 7:00 to midnight
10 essentially.

11 Q Okay. Could you just take us through the
12 exhibit a bit?

13 A Sure. I'm on the first page after the
14 header which is the children's program themes.
15 There's a wide variety of children's shows here,
16 starting with Arthur and Barney.

17 Let me take you through column by column.
18 Maybe we can go to the middle of the page, I guess
19 one, two, three, four, five, six, seven down, to
20 Mister Rogers' Neighborhood. Mister Rogers'
21 Neighborhood -- the first column, that's the name of
22 the show. The next column, moving over, has the theme

1 title, Won't You Be My Neighbor. "It's a wonderful
2 day in the neighborhood" --

3 The next column is -- shows its use in
4 that show is the opening theme, and the next column
5 shows that the writer is an ASCAP member, and 100
6 percent of the work is an ASCAP entitlement. The
7 publisher also 100 percent.

8 Going back over, Mister Rogers'
9 Neighborhood has a different song for the closing,
10 which is a song called Tomorrow. That's used as a
11 closing theme also. The writer's share is 100 percent
12 ASCAP, and the publisher's share is 100 percent ASCAP.
13 And as you go up and down the column, you can see
14 various uses of ASCAP music on different children's
15 shows.

16 CHAIRPERSON GRIFFITH: Do you want to hum
17 a little of that Tomorrow, please?

18 (Laughter.)

19 THE WITNESS: I'm usually on my way to
20 work by the time Tomorrow comes out.

21 (Laughter.)

22 I think I would have to get my daughter to

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1 come do that one.

2 MR. SCHAEFFER: I'm glad you didn't ask
3 me.

4 (Laughter.)

5 CHAIRPERSON GRIFFITH: Go ahead. I'm
6 sorry.

7 THE WITNESS: On the next page, it's
8 public television news and current affairs
9 programming. There are just a few here, but if you
10 look at the second line, it -- are you familiar with
11 NewsHour with Jim Lehrer perhaps, which is called the
12 MacNeil-Lehrer theme.

13 Even though MacNeil is not there any more,
14 the theme is, and they haven't changed the title of it
15 yet. And it is also as the opening and the closing
16 for the show, the same piece of music, another way it
17 is used. And that is also 100 percent writer ASCAP
18 and 100 percent ASCAP publisher.

19 JUDGE DREYFUS: Could you tell us, the
20 ASCAP share of 50 percent, was that --

21 THE WITNESS: When it's 50 percent, there
22 is a co-writer who is not ASCAP, perhaps with an

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1 affiliate society or -- it's not an ASCAP share.

2 JUDGE DREYFUS: Okay.

3 THE WITNESS: So there be a co-writer.

4 JUDGE DREYFUS: And then the other is
5 zero, so what is -- is that -- also, a zero for ASCAP.

6 THE WITNESS: Yeah. It's possible that
7 the work may not be published. If the writer has just
8 submitted as the writer, and he hasn't published the
9 work, it's not in our records that there's a publisher
10 of the work. It shows up on the database. This comes
11 from ASCAP's titles, and there is no publisher.

12 JUDGE DREYFUS: Okay.

13 BY MS. WILLETT:

14 Q Just for clarification, in that sense,
15 were you referring to the fact that perhaps the writer
16 owns the publishing and hadn't established a
17 publishing company to put --

18 A Yes.

19 Q -- the publishing share in?

20 A Yes. Yes. It could very well become an
21 ASCAP share, but I don't know that from looking at
22 this right now.

1 JUDGE DREYFUS: Well, does this mean that,
2 for example, there might be two writers, one of which
3 is a member of ASCAP, the other is not, there is no
4 publisher. Is that possible from these figures --

5 THE WITNESS: The other --

6 JUDGE DREYFUS: -- interpretation?

7 THE WITNESS: It's possible.

8 JUDGE DREYFUS: Okay.

9 THE WITNESS: It does happen.

10 Going up to the next page, the how to
11 shows -- baking shows and cooking shows and home
12 improvement shows -- going out to the one, two, three,
13 four -- the sixth title, also in the middle, This Old
14 House. It's a very familiar theme show. (Witness
15 hums the theme song). Which is called Louisiana
16 Fairytale, used as a theme for the opening and the
17 closing, which is 100 percent ASCAP writer and 100
18 percent ASCAP publisher. And there's a wide variety
19 of shows that use -- have two shows with ASCAP themes.

20 And the last page, prime time shows, we
21 see Lawrence Welk there in the middle as an example.
22 Adios, Au Revoir, Auf Wiedersehen, everybody knows

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1 that. The theme ASCAP 100 percent writer and
2 publisher.

3 Above that, the Great Performances theme
4 is also 100 percent ASCAP writer and publisher.

5 BY MS. WILLETT:

6 Q And again, this is not intended, or is it
7 intended to be a comprehensive listing of all of the
8 themes of ASCAP music on public television?

9 A No.

10 Q Okay. Now, we just looked in Exhibit 200
11 at some examples of ASCAP music as themes in
12 connection with children's shows. Is the use of ASCAP
13 music in children's shows limited to themes?

14 A No, it is not. Children's programs we use
15 -- have themes that are by ASCAP. They also have many
16 featured music performances that are ASCAP songs.
17 Shows like Sesame Street certainly have a lot of songs
18 running throughout the hour-long show. A show like
19 Kidsongs is virtually wall-to-wall songs. It's a good
20 title for the show. Even shows like Barney and
21 Friends, many songs are used as features in the show.
22 So, yes.

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1 Q Okay. I'd like for you to take a look at
2 ASCAP Exhibit 202. What is this exhibit?

3 A This is from the PBS web site online, and
4 within the PBS web site they have I guess smaller
5 links to -- within the web site to many different
6 shows on PBS. And this is -- this exhibit is the
7 Mister Rogers' Neighborhood part of the PBS web site
8 on the Internet.

9 And in the very first page, there is a
10 picture of Mr. Rogers. You can see up there a few
11 different icons that you could click on if you were to
12 go on this web site, and one of the icons in the top
13 right-hand corner is called sing-a-long. And if you
14 were on the Internet right now and you clicked on
15 sing-a-long, you would see the very next page, which
16 is the lyrics to some of Mr. Rogers' most popular
17 songs. And it runs down the list of songs that have --
18 a number of songs that have been on Mister Rogers,
19 certainly not all of the songs.

20 And then on the following pages are the
21 actual lyrics to these songs as written by Fred
22 Rogers. And I think the last page of this exhibit

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1 alphabetically is the song Won't You Be My Neighbor.
2 So if you're always curious about what the words were,
3 if you couldn't understand Mr. Rogers, there are the
4 lyrics, although he seems to sing pretty clearly when
5 he is taking his sweater off.

6 So that's this -- that's what this exhibit
7 is.

8 Q Could you look at the second page --

9 A Sure.

10 Q -- of the exhibit? Which is the back of
11 the first page. What is that first line there in the
12 text?

13 A "Music is an important part of Mister
14 Rogers' Neighborhood. The songs on each program often
15 express concerns and feelings that most young children
16 experience."

17 Q And then we have a list of songs here on
18 that page, and it says -- what does it say that those
19 songs are? I'm looking at the second paragraph of
20 text.

21 A Second paragraph? "Following are lyrics
22 from many of Fred Rogers' most popular songs.

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1 Questions about songs that are not listed" --

2 Q That's it. And these songs, did you --
3 are these songs in the ASCAP repertory?

4 A Yes, all of them.

5 Q All of them? Going back to one of the
6 other ways that you mentioned ASCAP music is used on
7 public television, you mentioned -- I'm looking in
8 paragraph 11 of your testimony -- you mentioned
9 background, transitional bridge music. Could you tell
10 the Panel what that means?

11 A Yes. Background music is music that is
12 used in the background of a program, as opposed to
13 asking James Taylor to come out to sing his next song.
14 Background music could be actual dramatic scoring in
15 a movie such as -- Citizen Kane is an example of a
16 movie chockfull of background scoring.

17 But other uses of -- other background uses
18 are sometimes -- just another use of the theme music
19 perhaps could be used as background. Background music
20 doesn't just have to be specifically written to be
21 used in the background. They may use it -- what is a
22 featured song. They could take Rhapsody in Blue and

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1 use it in background of a program. They could take
2 the theme from Sesame Street and use it during the
3 show as background music as well. That's background
4 music.

5 Q Well, let's talk a little bit about
6 another way ASCAP music is used on public television
7 described in your testimony. And I want to focus now
8 on something that you did -- prepare some examples of
9 song titles used on public television between public
10 television and commercial television.

11 Could you just describe briefly as we go
12 through this what you did to compare the song titles?

13 A We looked at the song titles that came
14 into ASCAP survey in survey year 1996, which is -- the
15 survey year is October 1, 1995, through September 30,
16 1996. And we took the songs that were played on --
17 that came to ASCAP survey on public television. We
18 took the songs that came to ASCAP survey of network
19 television, broadcast television, and cable
20 television.

21 And we took a look to see where the titles
22 played on both media types. So we looked to see where

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1 PBS -- ASCAP music was used on PBS and broadcast
2 television, and where ASCAP music was used on PBS and
3 cable television, to see where the titles were
4 similar.

5 Q And were you looking to find out whether
6 the song was used in the same way, if it was a theme
7 on one it was a theme on another?

8 A No. We were just looking to see whether
9 the same titles were picked up.

10 Q Or whether the song was used in connection
11 with the same show that may have been broadcast on one
12 and then another?

13 A No. We were just looking to see whether
14 the songs moved up.

15 Q Okay. And you compiled your results in
16 ASCAP Exhibits 203 and 204?

17 A Yes.

18 Q Do you have the exhibits?

19 A Yes, I do.

20 Q Let's look at ASCAP Exhibit 203 just for
21 one moment. The title says -- could you read the
22 title?

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1 A 203?

2 Q Yes.

3 A "ASCAP" --

4 Q The title at the top.

5 A "ASCAP Song Titles Captured in ASCAP
6 Survey of PBS Stations and Cable Program Services for
7 SY" -- survey year -- "1996."

8 Q And what did you mean by "cable program
9 services"?

10 A Cable program services -- cable services
11 that are licensed and included in ASCAP's survey, such
12 as A&E, Nickelodeon, MTV, Showtime, Discovery Channel,
13 HBO. I can go on for a while, I guess.

14 Q And just flip over to ASCAP Exhibit 204
15 for one moment and read the title of that exhibit.

16 A Yes. "ASCAP Song Titles Captured in ASCAP
17 Survey of PBS and Broadcast TV Stations" --

18 Q And --

19 A -- for SY 1996."

20 Q Okay. And the broadcast television
21 stations that you're referring to in that caption?

22 A Networks -- ABC, CBS, NBC -- local

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1 television stations.

2 Q Before we take a closer look at these,
3 just let me ask you one other question. In your
4 testimony in paragraphs 5 and 12, you refer to
5 something called a title code or a T code. What is
6 that?

7 A A title code is a nine-digit code that we
8 use in our computer system to uniquely identify a
9 work. The title code is applied to a song when it
10 appears in our -- in one of ASCAP's surveys. It is a
11 number that is supplied by the computer, so the
12 computer just selects the next available number. And
13 we have title codes for all works in ASCAP's
14 databases.

15 Q And by looking at the title codes you were
16 able to determine the matches?

17 A Yes. Each work has -- each title code is
18 obviously unique to a song. We were able to match up
19 via the title code from the different media types.

20 JUDGE DREYFUS: The computer did that,
21 right?

22 THE WITNESS: The computer did that.

1 BY MS. WILLETT:

2 Q And for ASCAP Exhibit 203, comparing the
3 public television stations and cable program services
4 -- I think I've got it out of order in your
5 paragraph 12 -- but what is the results of the
6 matches, the number of matches?

7 A Between PBS and cable, there were 2,039
8 matches, 2,039 titles. The same titles appeared both
9 on PBS stations and cable stations during survey year
10 1996. Same titles.

11 Q Could you just go through this and --

12 A Sure. I've picked out a few examples. On
13 the first page, Citizen Kane, halfway down -- I guess
14 three-quarters of the way down the page, Citizen Kane
15 Cues. Citizen Kane -- this music played on some PBS
16 station sometime during survey year 1996, and the
17 music also appeared on some cable stations, whichever
18 they were, also during the same year.

19 Q Okay.

20 A An example of how this is used in both
21 places. On page 3, near the bottom, Victor Victoria,
22 which is a film; page 5, in the middle, Alfie, a

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1 popular song; Anticipation, a Carly Simon song; and so
2 on and so forth. Page 9 -- page 9, the second song on
3 the top, Born in the U.S.A., a Bruce Springsteen song.

4 Q Could you sing that for us?

5 A "Born in the" --

6 (Laughter.)

7 Q Okay. Let's look at Exhibit 204. Could
8 you tell the Panel the results of your matching
9 process there, how many matches you found?

10 A Matches between PBS and the broadcast
11 stations, we found 3,465 titles that played both on
12 PBS and the same titles also appeared somewhere on a
13 broadcast station, one of the networks of the local
14 stations during the same survey year. And --

15 Q Do you have some examples you wanted to
16 share with the Panel?

17 A Sure. Page 5 -- this is one of my
18 favorite movies in the middle -- Royal Wedding Cues.
19 Royal Wedding is the movie where Fred Astaire is
20 dancing on the ceiling. Page -- page 13, near the
21 bottom, Bad, Bad Leroy Brown, a Jim Croce song. Page
22 43, I'd Like to Teach the World to Sing. I could

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1 probably go through a fair amount of the 3,465 titles,
2 but --

3 Q Now, let me just ask you again about both
4 of these exhibits. Was this intended to be the
5 universe of possible matches between songs performed
6 on public television and also performed on cable
7 programming services or broadcast television?

8 A No.

9 Q And it's limited to the time period that
10 you described?

11 A Yes.

12 Q And the stations and number of hours that
13 were captured --

14 A Yes.

15 Q -- by the survey? Okay.

16 Okay. Last but not least, we have one
17 more exhibit, which is a video, ASCAP Exhibit 201.
18 And this is one final use that you mentioned in your
19 testimony, one of the ways in which ASCAP music is
20 used on public television in connection with pledge
21 programs. What do you mean by "pledge programs"?

22 A What I mean by "pledge programs" -- there

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1 are programs that air on PBS during pledge weeks,
2 pledge months, and PBS stations are asking for -- it's
3 a membership drive, asking people to become members of
4 the stations, and they frequently show a lot of music
5 programs during pledge -- so that's why I'm referring
6 to a pledge program as a program they use during the
7 pledge drives.

8 Q And did you take a look at how ASCAP music
9 is used in connection with those pledge drives?

10 A Yes, we did.

11 Q Again, was this just a -- was this a
12 sample or study, or --

13 A No. It was just a sample of -- a look
14 when we knew there was a pledge period. It just -- it
15 was easy to just go to the stations and put the
16 videotape in and start taping programs during pledge
17 week. So there was nothing scientific about picking
18 the programs.

19 Q What stations did you look at, and what
20 time period?

21 A We looked during the August 1997 pledge
22 drive. We looked at WNET in New York, channel 13, and

1 we looked at channel 21 in Long Island, WLIW, during
2 the same period.

3 Q Okay. And let's go to the videotape, I
4 guess.

5 A Excuse me just --

6 MS. WILLETT: With your permission, he is
7 going to run this over here to make sure.

8 (Whereupon, the proceedings in the
9 foregoing matter went off the record at
10 2:53 p.m. and went back on the record at
11 3:04 p.m., during which time the above-
12 mentioned videotape was played.)

13 JUDGE GULIN: For the record, the video
14 that was viewed was ASCAP Exhibit 201. Is that
15 correct?

16 MS. WILLETT: That concludes Mr.
17 Saltzman's direct testimony. He is available for
18 cross examination.

19 CHAIRPERSON GRIFFITH: Mr. Kleinberg, do
20 you have any questions of the witness, sir?

21 MR. KLEINBERG: No, I don't.

22 CHAIRPERSON GRIFFITH: All right.

1 MR. RICH: With the Panel's consent, Mr.
2 Stein will be cross examining the witness.

3 CHAIRPERSON GRIFFITH: All right. Mr.
4 Stein?

5 CROSS EXAMINATION

6 BY MR. STEIN:

7 Q Good afternoon.

8 A Good afternoon.

9 Q You described the fact that you were
10 instructed to go and take a look for the types of uses
11 of music that appear on public broadcasting, correct?

12 A Correct.

13 Q And I assume you were not surprised to
14 find that, in fact, ASCAP music does appear on public
15 broadcasting programming?

16 A I was not surprised.

17 Q Okay. You discussed for us the range of
18 uses that that use involves, correct?

19 A Yes.

20 Q Okay. And, for example, you mentioned a
21 show like Mister Rogers, correct?

22 A Yes.

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1 Q Now, that show has been running on public
2 television for some time, has it not?

3 A Yes.

4 Q Since before 1978?

5 A Yes, I believe so.

6 Q Okay. And just to direct your attention
7 back to Exhibit -- I believe it's 200 -- I'm sorry,
8 202. You noted that one of the songs on that program
9 is Won't You Be My Neighbor, correct?

10 A Yes.

11 Q And I believe that it's about the third or
12 fourth page in on Exhibit 202, the lyrics for Won't
13 You Be My Neighbor appear.

14 MS. WILLETT: I think it's actually the
15 last --

16 THE WITNESS: It's the last song.

17 MS. WILLETT: -- page of the exhibit.

18 THE WITNESS: Won't You Be My Neighbor is
19 the last page.

20 BY MR. STEIN:

21 Q Okay. And am I correct that the copyright
22 on that song is 1967?

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1 A Yes.

2 Q Okay. And has Mister Rogers' Neighborhood
3 been running on public television continuously since
4 1978?

5 A I don't know. I think so.

6 Q Okay. So if you had been asked to take a
7 look at uses of ASCAP music on public television in,
8 say, 1982, you might have seen Mister Rogers, correct?

9 A Yes.

10 Q And the same would be true for 1987?

11 A Yes.

12 Q And for 1992?

13 A Yes.

14 Q Okay. Similarly, in your testimony, you
15 identify some other programs in which ASCAP music has
16 been used, such as Live at Lincoln Centre, correct?

17 A Yes.

18 Q And similarly, has that show been running
19 on public television for many years?

20 A For a number of years. I'm not sure how
21 many years.

22 Q Okay. It could have been running since

1 1978, correct?

2 A Yes. I'm not sure, though.

3 Q What about Sesame Street?

4 A I think that premiered somewhere in 1969,
5 1970.

6 Q So it has been running continuously on
7 public television --

8 A Yes.

9 Q -- since that time? And I think you also
10 noted Great Performances, correct?

11 A Yes.

12 Q Okay. And again, that show has been
13 running since 1978, correct?

14 A I don't know.

15 Q It's true, isn't it, that ASCAP has been
16 aware since at least 1978 that its music appears on
17 public television programming, both as themes,
18 background, and feature uses, correct?

19 MS. WILLETT: Excuse me. Could I ask for
20 clarification? You're asking is ASCAP aware, or are
21 you asking if he is aware? I'm not sure what you're
22 asking.

1 MR. STEIN: I asked him if ASCAP was
2 aware.

3 THE WITNESS: I don't know. I wasn't with
4 ASCAP in 1978.

5 BY MR. STEIN:

6 Q Do you have any reason to believe that
7 they were not aware that their music was running as
8 feature theme and background uses on public television
9 since 1978?

10 A They perhaps could have been aware. I'm
11 not -- I really can't say.

12 MR. SCHAEFFER: Could you keep your voice
13 up?

14 THE WITNESS: Yes, I'm sorry. I'm not --

15 MR. KLEINBERG: I can't hear either the
16 witness or the questions, for whatever that matters.

17 (Laughter.)

18 But I -- I would like to hear it. I would
19 ask that they both speak up.

20 MR. STEIN: I will try it again.

21 (Laughter.)

22 MS. WILLETT: You have never been

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1 criticized for being so --

2 MR. STEIN: I'll speak up.

3 BY MR. STEIN:

4 Q You also discussed the fact, and presented
5 a video, concerning the use of ASCAP music in what you
6 referred to as pledge programs, correct?

7 A Yes.

8 Q And those you described as programs that
9 air during pledge drives on public television,
10 correct?

11 A Yes.

12 Q And pledge drives are not a new phenomenon
13 on public television, are they?

14 A No.

15 Q And pledge drives have, in fact, been run
16 on public television stations since 1978, correct?

17 A I don't know that. I think they've been
18 running for a long time. I'm not sure about 1978,
19 though. I was studying then, studying music.

20 Q You don't have any reason to believe they
21 weren't running in 1978, do you?

22 A Just as I have no reason to believe they

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1 were.

2 Q Do you have any reason to believe ASCAP
3 was not aware that its music was being used on pledge
4 drives in public television programming over the
5 years?

6 A No.

7 Q Now, at the end of the video, I believe
8 there are a couple of statements concerning the
9 amounts of money purportedly raised by WNET in 1996,
10 correct?

11 A Yes.

12 Q And at page 4 of your testimony, you refer
13 to those portions of the videotape which describe the
14 amount of money raised during the pledge drives,
15 correct?

16 A Yes.

17 Q I'm looking at the last sentence of -- I
18 believe it's your paragraph 7, in which you state that
19 "There is certain further information at the end of
20 the video concerning the amount of funds raised during
21 the pledge drive that it is my understanding was
22 derived from exhibits being submitted to the Panel,"

1 correct?

2 A Yes.

3 Q And at the end of the video, I believe the
4 figure \$29.7 million appears, correct?

5 A Yes.

6 Q So I take it your statement was meant to
7 imply that WNET raised about \$29.7 million in its
8 August pledge drive?

9 A Yes.

10 Q On what do you base your statement that
11 that figure of \$29.7 million represents the amount of
12 money which was raised by NET during that pledge
13 drive?

14 A I'm not sure of the document which came --
15 I was led to understand that that's the amount of
16 money that was raised during that pledge drive, and we
17 inserted it into the video. But I'm not sure where
18 that amount came --

19 Q Okay. I don't know if we can replay the
20 video. I'm not sure we need to. Let me just set
21 forth that the sentence which appears at the end of
22 the video, in fact, says, "In 1996, WNET raised

1 \$29.7 million in operating funds from viewer
2 contributions." Now, that statement doesn't say that
3 it raised such money during the pledge drive, does it?

4 A No.

5 Q Okay. And WNET has the opportunity to
6 raise money from its viewers through means other than
7 the pledge drive, does it not?

8 A Yeah. I don't know. Do they? I don't
9 know the answer to that.

10 Q Okay. So you don't know about other
11 possible ways which WNET might raise money from its
12 members, other than through its pledge drive?

13 A Not off hand.

14 Q So if I -- in that case, you don't know
15 whether the \$29.7 million figure which was attributed
16 to be for viewer contributions actually represents
17 money that was raised from that pledge drive, do you?

18 MR. SCHAEFFER: Bev, why don't you --

19 MS. WILLETT: That's not what the exhibit
20 says, Mark, and you've just asked him the question
21 already, Mr. Stein.

22 MR. STEIN: Okay. Would it --

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1 MS. WILLETT: And I think he has answered
2 you.

3 JUDGE DREYFUS: Is there an objection?

4 CHAIRPERSON GRIFFITH: Do you object to
5 that?

6 MS. WILLETT: I do. I think you have
7 asked it already. You have read the card, you have
8 asked him the question, and he has answered it.

9 MR. STEIN: Okay. I'll move on.

10 CHAIRPERSON GRIFFITH: Okay. Thank you.

11 BY MR. STEIN:

12 Q Would it surprise you to find out that, in
13 fact, only about \$4 million was raised as a result of
14 pledge drives on WNET in 1996?

15 A I would take it as a fact. I would be
16 neither surprised nor excited about it. It's a
17 number.

18 Q You also testified concerning similarity
19 of uses between songs that appear on public television
20 and songs that appear on either broadcast television
21 or cable, correct?

22 A Yes.

1 Q And is my understanding correct that in
2 order for you to consider a song to have appeared on
3 both those mediums, it need only have appeared once in
4 public television or broadcast or cable television in
5 order to constitute a match as far as you were
6 concerned?

7 A Yes.

8 Q So it's possible that a song could have
9 appeared thousands of times on broadcast television
10 and only once on public television, and you would
11 still have considered that a match?

12 A Yes.

13 Q Okay. Now, I know you pointed us to a
14 bunch of examples, and I'd just like to draw your
15 attention to a few others. We could take a look at
16 Exhibit 204, which is, I believe, the list of matches
17 between public television and broadcast television.
18 I'd direct your attention to page -- I believe it's
19 77. Do you see there at the bottom of the page that
20 multiple times Sesame Street Cues appears?

21 A Yes.

22 Q What do you suppose the explanation is for

1 that?

2 A The explanation for that is the way ASCAP
3 creates a title called Sesame Street Cues is as
4 follows. When we receive music information about
5 music on Sesame Street, we would look to see which
6 music was used as background music. And in order to
7 create titles, and for our title database to create
8 records that we can distribute royalties off of, we
9 will group together music by the same writers and the
10 same publishers.

11 So if writer A and writer B are together
12 with publisher A and B for a song called I'm Walking
13 Down the Street, ASCAP would translate that to Sesame
14 Street Cues for writer A and B and publisher A and B.

15 The next song in the show is by -- is I'm
16 Going Home Now by writers C and D and publishers C and
17 D, and we would also make a title called Sesame Street
18 Cues with a different title code. So while you see
19 here Sesame Street one, two, three, four times, each
20 one of those is going to have a different title code,
21 a nine-digit title code, representing a different
22 writer and publisher.

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1 Maybe one writer and one publisher or two
2 writers or as many writers and publishers as are
3 involved in each cue. That's the explanation of why
4 we see the same title occurring four different times.
5 They are indeed different title codes.

6 Q And Sesame Street runs principally on
7 public television, correct?

8 A Yes.

9 Q Okay. Are you aware of it running on
10 commercial television?

11 A The full-length program, no.

12 Q So more than likely, this is appearing
13 because some aspect of that music was picked up in
14 some other manner in ASCAP's survey of broadcast
15 television, correct?

16 A Yes.

17 Q Maybe as part of a news story or something
18 like that?

19 A Or a part of -- as a network special.
20 Last week on -- I'm sorry, I think two weeks ago, ABC,
21 on Friday night, aired a new show called Elmo Palooza,
22 which was produced by Children's Television Workshop,

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1 who produces Sesame Street. It was a show -- an hour-
2 long special on network television, ABC, called Elmo
3 Palooza, and in that show they used songs that I know,
4 in fact, are also used on the PBS Sesame Street show.
5 So there is another use, instead of just news
6 programs. Also feature use as in a variety program.

7 Q Okay.

8 MR. STEIN: This I'm going to have to have
9 marked, and I think I'll move this in. Number 15.

10 CHAIRPERSON GRIFFITH: 15? Okay.

11 MR. STEIN: PB Hearing Exhibit 15X.

12 (Whereupon, the above-referred
13 to document was marked as PB
14 Exhibit No. 15X for
15 identification.)

16 BY MR. STEIN:

17 Q Now, let me say that what this purports to
18 be is a printout of the survey distribution database
19 which was produced to the public broadcasters which
20 was used for purposes, I believe, of generating the
21 matched title programs that you testified about. Does
22 that look like that to you, Mr. Saltzman?

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1 A Yes.

2 Q Okay. And can you just describe for us
3 what the columns represents, Survey Quarter, T Code,
4 Title, etcetera?

5 A Sure. The first column all the way on the
6 left is Survey Quarter, and it says 1995-4. That's
7 1995, fourth quarter, which as I said before was the
8 first quarter of survey year 1996, because it starts
9 October 1. So survey year 1996 starts with 1995-4.

10 The next column is the T Code, the title
11 code, which is the title code I was describing before.
12 And we look like -- whoever printed this out needed to
13 spread the column out one more digit, because there
14 are only eight digits here. Whoever printed this out
15 probably scrunched it up a little bit.

16 Q Okay.

17 A But there would be nine digits there for
18 the title code. The title from the top -- the first
19 title is American Patrol. The Medium, in the next
20 column, T stands for television. This is -- and the
21 radio would have been R. The Source, those are the
22 call letters of the station -- KAME, which I'm not

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1 sure where that is.

2 Categories are -- the next column,
3 Category, are just numbers that are assigned to groups
4 of stations for purposes of the computer distribution
5 system. So I think it groups together stations in
6 certain category codes. 83 is the code for KAME,
7 which I think is -- I think that's a local television
8 station.

9 And the next one down, KLTS, category 280,
10 would be a PBS station. I think all of the PBS
11 stations are probably grouped into category 280.
12 Showing up in the next column -- there are checkmarks
13 showing -- I guess the check -- a check means PBS.

14 And then the last column, Program Number,
15 is a unique --

16 MS. WILLETT: Could I just ask for
17 clarification? This writing that's on here and the
18 checkmarks, is that something that you added, or is
19 that from the printout --

20 THE WITNESS: Because I don't remember
21 that being --

22 MS. WILLETT: -- Mr. Stein?

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1 MR. STEIN: Actually, I'm not certain, but
2 I am willing to represent that we added it. I don't
3 think it could have been contained on a computer.

4 MS. WILLETT: Okay. So this is --

5 MR. STEIN: I don't think it could have
6 been contained on the computer system.

7 MS. WILLETT: -- this is not a printout
8 from what was produced? These handwritten things in
9 this column were added?

10 MR. STEIN: With the exception of those
11 four --

12 MS. WILLETT: Okay.

13 MR. STEIN: -- words --

14 MS. WILLETT: Okay.

15 MR. STEIN: -- it's a representation of
16 the --

17 MR. SCHAEFFER: The PBS column?

18 MR. STEIN: The PBS column was contained
19 in the -- I understand to be contained in the data
20 that we were provided.

21 MR. SCHAEFFER: Well, we'll check that.

22 THE WITNESS: The last column is Program

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1 Number. For the programs as they are processed
2 through ASCAP's distribution system, each program --
3 and a program would be Sesame Street from 7:00 a.m. to
4 8:00 a.m. on WNET -- would get a program number, and
5 that would follow the crediting of the program through
6 ASCAP's distribution system.

7 So we would be able to say that -- and you
8 can't tell from this database, but 62TDP would refer
9 to a single performance of an episode of whatever
10 show. That's a unique number. And there is no
11 significance; it's just a numbering sequence that
12 ASCAP designed with two numbers and three alphas,
13 because we need a lot of numbers.

14 JUDGE DREYFUS: You don't have the date of
15 that performance, other than fourth quarter, on this
16 database?

17 THE WITNESS: I don't remember if in the
18 underlying data they had the exact date for that
19 station -- the time for that program. I don't
20 remember.

21 BY MR. STEIN:

22 Q Can you describe how you would go through

1 the process of matching the public television airings
2 of music to commercial or cable airings of music to
3 determine how many matches there were?

4 A Well, this was done, I think, in Access
5 database program and just said link the title codes
6 from this database of these stations -- local and
7 network broadcast stations -- to the PBS stations and
8 see where the titles -- title codes are the same. And
9 that's pretty much the way it was done.

10 Q Am I correct that in order to determine
11 what is a public television station versus a
12 commercial or a cable station you would look to the
13 category code?

14 A You would look to the category code or the
15 call letters.

16 Q Okay. But you could look to the category
17 code in terms of determining which station was a
18 public television station?

19 A Yes. I believe we group all of the PBS
20 stations under 280.

21 Q Okay. So as I understand it, if we do
22 that, if we take all of the public television station

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1 category codes and attempt to match them to the
2 broadcast television category codes, or match them
3 against the broadcast television category codes, it's
4 your testimony that we would generate off of this
5 database approximately 3,000 matched title codes,
6 correct?

7 A Yes.

8 Q And if we performed a similar process for
9 cable category codes against public television
10 category codes, we would generate the numbers set
11 forth in your testimony for cable --

12 A Yes.

13 Q Okay. Now, I am correct that you have not
14 attempted to analyze how this similarity of uses
15 between public television and cable, or public
16 television and commercial television, respectively,
17 has changed, if at all, over time, correct?

18 A Correct.

19 Q Okay. So you don't know whether the
20 number of compositions that appear in both public and
21 commercial television or public and cable television
22 has become higher, lower, or remained constant?

1 A Correct.

2 Q Okay. And you have not done a similar
3 comparison to the one you have done for TV, comparing
4 songs that appear in commercial and public radio,
5 correct?

6 A No.

7 MR. STEIN: That's all my questions.

8 CHAIRPERSON GRIFFITH: All right. Any
9 redirect?

10 MS. WILLETT: I just have a couple of
11 questions, Your Honor.

12 CHAIRPERSON GRIFFITH: Please.

13 REDIRECT EXAMINATION

14 BY MS. WILLETT:

15 Q Mr. Stein asked you a couple of questions
16 about some children's programming. I believe he asked
17 a question about Mister Rogers' Neighborhood and asked
18 you whether you knew if it was on during certain
19 random dates that he picked. Would you know, for
20 example -- you mentioned Puzzle Place in paragraph 6
21 of your testimony -- whether -- let's pick a random
22 date -- '82 --

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1 A No. We --

2 Q Was that on then?

3 A No.

4 Q Arthur -- I believe you mentioned Arthur
5 in connection with ASCAP Exhibit 201. Was that on in,
6 let's say, random dates '82, '87? Was that on --

7 A No. Arthur was not --

8 Q -- public television?

9 A -- on. Arthur is a more recent program.
10 It is actually on the cover of TV Guide this coming
11 week -- Arthur.

12 Q Okay. And I think that Mr. Stein also
13 mentioned Lawrence Welk, and you mentioned some music
14 programs in paragraph 10 of your testimony -- Sessions
15 at West 54th Street. Was that on, to pick some random
16 dates, in '82, '87, '92?

17 A No.

18 Q Okay. And then, Mr. Stein asked you some
19 questions about ASCAP Exhibit 204, the Sesame Street
20 Cues, that --

21 A Yes.

22 Q -- he referred to. And there were, I

1 believe, four cues there. Is the purpose of that, the
2 fact that it was listed four times, to show that it
3 was actually four different pieces of music --

4 A Yes.

5 Q -- within that program? I believe you
6 mentioned it could be even owned -- could be written
7 by different writers, perhaps even have a different
8 copyright. Is that correct?

9 A Yes. That actually is what it would be --
10 four different titles. If we listed it out four
11 different times, it would be four different titles,
12 four different copyrights.

13 Q Okay.

14 MS. WILLETT: I have no further questions.

15 CHAIRPERSON GRIFFITH: Mr. Kleinberg?

16 MR. KLEINBERG: I actually have a
17 question, if I might.

18 CHAIRPERSON GRIFFITH: All right.

19 RECROSS EXAMINATION

20 BY MR. KLEINBERG:

21 Q Mr. Saltzman, you were asked by Mr. Stein
22 whether it was possible that there could have been a

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1 thousand performances of -- or thousands of
2 performances of one of these matched titles on
3 commercial broadcasting as opposed to only one
4 performance on public broadcasting. Do you remember
5 that question?

6 A Yes, I do.

7 Q And you said, yes, that was possible. I
8 take it the converse is also true, that there could
9 have been thousands of performances of, let's say,
10 Sesame Street Cues on public broadcasting stations and
11 only one performance on a commercial or a cable
12 television station, is that right also?

13 A Yes, it is.

14 Q And your analysis here only purported to
15 get the match of one performance in each medium in
16 terms of the period of time it was covered by the
17 survey, is that right?

18 A That's correct.

19 Q You didn't measure the number of
20 performances, right?

21 A No.

22 Q And is it also correct that this match

1 that you did involved only music in the ASCAP
2 repertory and didn't include BMI, for example?

3 A Yes.

4 MR. KLEINBERG: Thank you.

5 CHAIRPERSON GRIFFITH: All right. Any
6 other questions?

7 JUDGE DREYFUS: I have one quick question.

8 CHAIRPERSON GRIFFITH: All right. Judge
9 Dreyfus?

10 JUDGE DREYFUS: For the service year 1996,
11 do you know how many titles were performed on public
12 broadcasting total -- total titles?

13 THE WITNESS: No, I don't know the total
14 number of titles. I don't recall the complete number
15 of titles, no.

16 JUDGE DREYFUS: Would they be in the tens
17 of thousands? Would they be in the thousands or tens
18 of thousands?

19 THE WITNESS: They would be in the
20 thousands.

21 JUDGE DREYFUS: Only in the thousands?

22 THE WITNESS: Maybe -- possibly in tens of

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1 thousands. Possibly.

2 JUDGE DREYFUS: Tens of thousands?

3 THE WITNESS: Possibly.

4 MR. SCHAEFFER: Mr. Boyle will know that.

5 JUDGE DREYFUS: Oh. Okay.

6 CHAIRPERSON GRIFFITH: Okay. May this
7 witness be excused?

8 Mr. Saltzman, thank you very much, sir.
9 You may step down. You are free to go.

10 THE WITNESS: Thank you.

11 (Whereupon, the witness was excused.)

12 CHAIRPERSON GRIFFITH: All right. Mr.
13 Schaeffer, attempting to run a tight ship here, it
14 appears to me that we are a minute before our
15 afternoon recess. Can you accomplish your next
16 witness in that period of time?

17 (Laughter.)

18 MR. SCHAEFFER: I would if I could but I
19 can't so I won't.

20 CHAIRPERSON GRIFFITH: All right.

21 MR. SCHAEFFER: But, Judge, I think I can
22 report to you with some degree of assurance that we

1 should be able to finish the scheduled witnesses
2 today.

3 CHAIRPERSON GRIFFITH: Okay. And let me
4 just inquire about one other thing. What time would
5 you ladies and gentlemen like to start in the morning?

6 MR. SCHAEFFER: 9:30 would be great for
7 us, Judge.

8 CHAIRPERSON GRIFFITH: 9:30 is my
9 preference. I come in on the train.

10 MR. KLEINBERG: I think sooner would be
11 better considering that it's Friday and --

12 CHAIRPERSON GRIFFITH: All right. How
13 about we'll start at 9:30 in the morning. Is that
14 agreeable with everyone?

15 Okay. We'll take a 10-minute recess at
16 this time, please.

17 (Whereupon, the proceedings in the
18 foregoing matter went off the record at
19 3:31 p.m. and went back on the record at
20 3:45 p.m.)

21 CHAIRPERSON GRIFFITH: Ma'am, would you
22 raise your right hand to be sworn, please?

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1 Whereupon,

2 CAROL GRAJEDA

3 was called as a witness and, after having been first
4 duly sworn, assumed the witness stand, was examined
5 and testified as follows:

6 MR. SCHAEFFER: Your Honors, it would be
7 useful, I think, for -- I don't know if you have it in
8 front of you to refer to the table of contents -- or
9 list of exhibits, I should describe it. And I've got
10 an extra copy.

11 CHAIRPERSON GRIFFITH: That would be very
12 helpful. We have a --

13 MR. SCHAEFFER: I know, but there's no
14 reason why you should have to -- and I have enough, I
15 think, for everybody.

16 Shall I proceed now?

17 CHAIRPERSON GRIFFITH: Yes.

18 Mr. Schaeffer, you're not asking us to
19 mark this in any way?

20 MR. SCHAEFFER: No, no, no; this is just
21 a duplicate of what's already in there, but I think it
22 will facilitate the examination.

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1 CHAIRPERSON GRIFFITH: Thank you.

2 DIRECT EXAMINATION

3 BY MR. SCHAEFFER:

4 Q Ms. Grajeda, by whom are you employed?

5 A White & Case.

6 Q And what was your job prior to December
7 29, 1997?

8 A I was a senior legal assistant in the
9 litigation department.

10 Q And what is your job now?

11 A I'm the assistant manager for corporate
12 legal assistance.

13 Q Is that a promotion?

14 A Yes.

15 Q Okay. Did you have, as a senior legal
16 assistant, any role in collecting the documents which
17 were submitted to CARP as ASCAP exhibits in this
18 proceeding?

19 A Yes, I did. Under the direction of Ms.
20 McGivern, I collected many of the documents.

21 Q And did Ms. McGivern in turn give you a
22 number of documents to submit which you understood

1 were publicly available?

2 A Yes, I did.

3 Q Let me turn to the table of contents, and
4 I'm going to ask you what your sources were for
5 certain of the documents which are listed therein.

6 First, Exhibits 1 through 16 and Exhibit
7 338, what was the source of that?

8 A Those were gathered from the library of
9 White & Case. Those were pulled out of the books that
10 we have on the shelves.

11 Q And then --

12 MR. WEISS: Excuse me, Your Honors; I'm a
13 bit confused. I don't believe this Ms. Grajeda has
14 been listed as the sponsor for certain of those
15 exhibits. One through eight, I believe, were listed
16 as other individuals as the appropriate sponsors.

17 MR. SCHAEFFER: Yes. Well, it's not a
18 question that I'm trying to tell you where everything
19 was obtained from. There may be some overlap, Mr.
20 Weiss, but I think it's worthwhile to know where she
21 got whatever material she got from.

22 If I can --

1 BY MR. SCHAEFFER:

2 Q Now did you get any material from the Web
3 pages on the Internet?

4 A Yes, I did. I spent many hours and many
5 days gathering Web site information.

6 Q And I'm going to ask you as we go down --
7 would you tell me, did you get Exhibit 313 from the
8 Internet?

9 A Yes, I did. I got it from the Corporation
10 of Public Broadcasting's Web page.

11 Q And what about 319 through 321?

12 A Yes, I obtained those from the National
13 Public Radio's Web page.

14 Q 322 to 23?

15 A I obtained those from the Public Radio
16 International Web page.

17 Q 325 through 327?

18 A I obtained those from the PBS Web page.

19 Q And 329?

20 A I obtained that from the Current online
21 Web page.

22 Q What do you understand Current to be?

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1 A A periodical.

2 Q And Exhibits 500 to 504, and 616 to 622,
3 where did you get those from?

4 A Again, those are from the Web site pages
5 of PBS.

6 Q Are those PBS or some other source?

7 A Oh, I'm sorry; from National Programming
8 -- no, from public television, and 600 --

9 Q We're talking 500 to 504, and 616 to 622.

10 A Yes, from public television and public
11 radio stations on the Web.

12 Q Well, when you say public television
13 stations, would those be individual stations?

14 A Yes.

15 Q So as opposed to PBS or NPR, these are the
16 actual stations --

17 A Web sites.

18 Q -- which have Web sites?

19 A Yes.

20 Q And how did you know which stations to
21 peruse in order to get the Web site material?

22 A I was given a list of all public TV

1 stations as well as public radio stations.

2 Q And who gave you that list?

3 A Joan McGivern.

4 Q Next would you -- Exhibits 505 through
5 525, what was your source for that?

6 A Along with the assistance of Joan
7 McGivern, those are periodical Current excerpts from
8 the Current magazine.

9 Q And did Ms. McGivern designate the
10 excerpts?

11 A Yes, she did.

12 Q And then you proceeded to photocopy them
13 and produce them?

14 A And cut and paste them.

15 Q What about 704 through 720?

16 A Again, under the direction of Ms.
17 McGivern, I was told which ones.

18 Q I'm trying to see if I screwed up my
19 notes, which is not unusual.

20 A 704 through 720.

21 Q Now finally, Exhibits 300 through 312,
22 where did you get them from?

1 A I collected those along with the
2 assistance of Joan McGivern.

3 Q And where did they come from?

4 A They were general public documents, so we
5 obtained them from the CPB.

6 Q The first set that I just mentioned is
7 from the Corporation for Public Broadcasting?

8 A Correct.

9 Q And what about 314 and 315?

10 A We obtained those from NPR.

11 Q 316, 318?

12 A I'm sorry, we obtained those from NPR as
13 well, the National Public Radio.

14 Q 324?

15 A We received that from the Public Radio
16 International.

17 Q 330 through 331?

18 A 330 and 331 we received from PBS.

19 Q 332 through 336?

20 A From the Program Resources Group.

21 Q 339 through 342?

22 A 339 through -- 339, Mr. Schaeffer?

1 Q Yes, on roman numeral eleven.

2 A 342 we received from the Program Resources
3 Group.

4 Q And 339 and 340 and 341?

5 A I believe those are pie charts.

6 Q No, I don't think -- are you looking at
7 the table of contents?

8 A Yes.

9 Q It says revenue of Public Broadcasting by
10 source.

11 A We received it from that organization.

12 Q Okay, and 340 and 341?

13 A Again, we received it from the public
14 radio and public television.

15 Q All right. And 300 -- well, you said 342.
16 401 through 410?

17 A Those are annual reports that we received
18 from the individual stations.

19 Q How did you get those?

20 A I placed phone calls to each of the
21 stations and asked for the public document.

22 Q 411 and 412?

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1 A Again, I placed phone calls to the
2 individual stations asking for the public document.

3 Q And 414?

4 A Again, I called WGBH and asked for a mail
5 order catalog.

6 Q 610 through 615?

7 A Those are annual financial reports that I
8 obtained through phone calls made to the individual
9 stations.

10 Q 623?

11 A I received that from Pacifica Foundation
12 by making a phone call to them.

13 Q And 700 through 703?

14 A Again, it's from making a phone call.

15 Q 328?

16 A 328 was a 1997 solicitation to ASCAP that
17 we received from them.

18 Q From ASCAP?

19 A Uh-huh.

20 Q And 400 and 600?

21 A 400 and 600 were charts of the top ten
22 producing public TV stations and radio stations that

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1 I did under the supervision of Sam Mosenkis and Joan
2 McGivern.

3 MR. SCHAEFFER: I have no further
4 questions.

5 CHAIRPERSON GRIFFITH: Mr. Kleinberg, do
6 you have any questions?

7 MR. KLEINBERG: No.

8 CHAIRPERSON GRIFFITH: Thank you.

9 Mr. Weiss?

10 MR. WEISS: I have some questions, Your
11 Honor.

12 CROSS EXAMINATION

13 BY MR. WEISS:

14 Q As I count it, Ms. Grajeda, you're seeking
15 to sponsor 137 exhibits on behalf of ASCAP in this
16 proceeding, is that right?

17 A That's correct.

18 Q These are not documents that you said that
19 you happened to have lying around your office, are
20 they?

21 A No.

22 Q They're not documents that you work with

1 in the ordinary course of the job that you do for
2 White & Case, are they?

3 A No.

4 Q You don't -- you didn't happen to take
5 them out of the magazine rack in your home, did you?

6 A No, I did not.

7 Q So essentially you went out on the
8 Internet and surfed the Web for whatever you could
9 find on public broadcasting, is that right?

10 A Correct.

11 Q And you also mentioned that you made phone
12 calls to collect certain documents as well, correct?

13 A That's correct.

14 Q Several of the documents you said you made
15 phone calls to the Corporation for Public Broadcasting
16 to request documents that you've sought to sponsor in
17 this proceeding, correct?

18 A Correct.

19 Q When you called, did you identify the
20 purpose for which you were seeking those documents?

21 A I identified the company that I was
22 calling from, and they asked me the purpose, and I

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1 explained that we were conducting a study.

2 Q Did you indicate when you -- who did you
3 speak to, by the way, from Corporation for Public
4 Broadcasting to obtain the documents?

5 A I spoke to several different people
6 because we made several phone calls to them.

7 Q Were any of the people that you spoke with
8 aware that you were doing this study in connection
9 with a litigation against the Corporation for Public
10 Broadcasting?

11 A They didn't ask.

12 Q Did you identify yourself as somebody who
13 was working for a law firm representing ASCAP in a
14 litigation against the Corporation for Public
15 Broadcasting?

16 A They didn't ask. I said I was an employee
17 of White & Case.

18 Q Did the people that you spoke with, are
19 they people that you would have expected in the
20 ordinary course would know that White & Case was the
21 law firm representing ASCAP in a proceeding against
22 the Corporation for Public Broadcasting?

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1 A I'm not aware of what the employees of CPB
2 know.

3 Q When you called the Public Broadcasting
4 Service and asked for documents that they claimed were
5 -- that you are seeking to sponsor here in this
6 proceeding, did you identify -- how did you identify
7 yourself in those conversations?

8 A Again, I identified myself as being an
9 employee of White & Case and we were conducting a
10 study.

11 Q Did you ever indicate to the employees of
12 the Public Broadcasting Service with whom you spoke
13 that you were representing ASCAP in a proceeding
14 against the Public Broadcasting Service?

15 A No, I was never asked.

16 Q And when you -- by the way, when did you
17 seek these documents?

18 A Do you want to know the exact dates or
19 just the months? I mean --

20 Q No, was it before or after this proceeding
21 had begun?

22 A It was, I guess, after. I don't know the

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1 official date of the start --

2 Q So that after this CARP had essentially --
3 the process had begun to run, you started to make
4 these phone calls and go out in the Web sites and
5 start to collect documents, correct?

6 A Correct.

7 Q So that -- National Public Radio, you said
8 you also called them. Again, did you identify
9 yourself as being involved in a proceeding adverse to
10 the National Public Radio on behalf of ASCAP?

11 A No, I did not.

12 Q Okay. And were the people that you spoke
13 to at National Public Radio aware of the fact that
14 White & Case was representing ASCAP in a proceeding
15 against National Public Radio?

16 A It never came up in the course of the
17 conversation. I don't know what they are aware of.

18 Q Okay. Similarly, you mentioned that you
19 had conversations with individual public television
20 and radio stations to collect information from them as
21 well, correct?

22 A That's correct.

1 Q And in any of those conversations, did you
2 indicate that you were representing ASCAP in a
3 proceeding that was adverse to at least certain
4 interests that they may have in connection with this
5 proceeding?

6 A No, it never came up. I was obtaining a
7 public document.

8 Q Are you aware of the discovery rules in
9 this proceeding?

10 A I don't know them verbatim.

11 Q Are you aware that parties are not
12 entitled to seek discovery in this proceeding from
13 other parties?

14 MR. SCHAEFFER: I object. I don't know
15 what you mean by discovery. Of course we're entitled
16 to seek discovery.

17 MR. WEISS: Well, are you aware that
18 parties are not entitled to seek discovery other than
19 as to documents underlying the testimony being
20 proffered in this proceeding?

21 MR. SCHAEFFER: I'm going to object asking
22 a paralegal the legal opinion on the rules of this

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1 proceeding. I'm perfectly willing to argue this
2 point, but I don't think we should subject the
3 paralegal to that.

4 CHAIRPERSON GRIFFITH: Can you answer the
5 question or not?

6 THE WITNESS: I'm sorry, can you repeat
7 the question?

8 CHAIRPERSON GRIFFITH: Are you aware -- go
9 ahead.

10 MR. WEISS: Are you aware that the only
11 discovery permitted in this proceeding is of
12 information underlying testimony being proffered by
13 one side or the other?

14 CHAIRPERSON GRIFFITH: Can you answer that
15 or not?

16 THE WITNESS: No, I can't. I was --

17 CHAIRPERSON GRIFFITH: Okay.

18 MR. WEISS: Okay, why don't we move on
19 then.

20 BY MR. WEISS:

21 Q You wouldn't consider yourself an expert
22 on any of the matters reflected in any of the

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1 documents that you're seeking to sponsor in this
2 proceeding, would you?

3 A No.

4 Q You're not an expert on public television,
5 are you?

6 A No.

7 MR. SCHAEFFER: We'll stipulate she's not
8 an expert and has no substantive knowledge.

9 MR. WEISS: Okay, I'll accept that
10 stipulation.

11 BY MR. WEISS:

12 Q You're not testifying in any way as to the
13 relevance of any of the documents that you're seeking
14 to sponsor in this proceeding, correct?

15 A Correct.

16 Q In fact, you don't really know necessarily
17 what the relevance is of the documents that you're
18 seeking to sponsor in this proceeding, do you?

19 A Correct.

20 Q You didn't obtain instructions from any of
21 ASCAP's experts to compile these documents on their
22 behalf, did you?

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1 A No.

2 Q As you said, the person who told you what
3 to get and, in some cases, where to get it was a
4 lawyer for ASCAP, Ms. McGivern, correct?

5 A Correct.

6 Q You're not in any way suggesting to the
7 Panel how the documents that you're seeking to sponsor
8 might assist them in reaching a determination as to
9 the reasonable fees for ASCAP in this proceeding, are
10 you?

11 A No.

12 Q Okay.

13 MR. WEISS: Your Honors, I move to strike
14 Ms. Grajeda's testimony and all of the documents that
15 she's seeking to sponsor under rule 250 -- excuse me,
16 251.43, subsection (e), no evidence, including
17 exhibits, may be submitted without a sponsoring
18 witness except where the CARP Panel has taken official
19 notice, etc.

20 The clear purport of that provision of the
21 rules is to require that somehow or other the
22 testimony and exhibits being offered be linked up to

1 the case. Ms. Grajeda is not competent to link up any
2 of the documents or data that she's sponsoring or
3 seeking to sponsor to this case.

4 Ms. Grajeda seems like a very bright
5 woman. But, frankly, I could go out, walk the halls
6 of this library, and find any bright woman with a
7 modem and a telephone and ask them to compile a bunch
8 of documents as well.

9 They would be in no better position than
10 Ms. Grajeda is to tell us or tell Your Honors why
11 these documents are relevant to this proceeding or how
12 they might assist you in connection with reaching a
13 determination as to what a reasonable fee for ASCAP
14 is.

15 We've got boxes of documents sitting back
16 here, much of which is patent hearsay. Frankly, I
17 think it's completely inappropriate to put the
18 evidence into the record through this witness.

19 And I would move to strike again Ms.
20 Grajeda's testimony and all the exhibits that are
21 being sponsored by her.

22 MR. SCHAEFFER: This application was made

1 to the Copyright Office and denied previously. There
2 was a motion made to strike Ms. Grajeda's testimony
3 and all of these documents. That was denied by the
4 Copyright Office.

5 I don't suggest that it's not within your
6 power to overrule the Copyright Office in that
7 respect. It seems to me the question really comes
8 down to nothing in the rules provides that a
9 sponsoring witness of admissions has to establish the
10 relevance of the admissions.

11 These are all submitted in -- as
12 preexisting documents; the vast preponderance, 95% of
13 them, coming either from people with whom we're
14 litigating or the people they represent.

15 Our purpose in doing that is, of course,
16 to put them in as any other kind of admissions. It
17 would be an extraordinary arbitration or an
18 extraordinary administrative proceeding if the
19 admissions of a party couldn't be used as documentary
20 basis -- as a basis for evidence.

21 It would be particularly inappropriate in
22 a case where we have no depositions, we have no power

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1 of subpoena apparently, nothing else. There's no
2 claim here that any of this is confidential.

3 These are matters of public record that
4 you simply get by going out on the Net or they're
5 listed in the various catalogs of CPB or PBS or the
6 like or the individual stations.

7 So that the purpose of having Ms. Grajeda
8 identify them is to tell you where she got them and,
9 in fact, that they are publicly available. I don't
10 see any reason why this Panel should close its eyes to
11 what's available to everybody else throughout the
12 entire public as to the reality.

13 We've got, for example, statements of the
14 income and expense of the PBS stations and all the
15 rest -- of course you should know that in order to
16 make your determination.

17 That's, in essence, my argument.

18 MR. WEISS: Your Honors, if I may?

19 CHAIRPERSON GRIFFITH: Go ahead, yes.

20 MR. WEISS: There are, as I indicated, and
21 as Ms. Grajeda indicated, 137 exhibits. I don't,
22 frankly, want to waste Your Honors' time right now

1 going through each and every one of those exhibits.

2 Suffice it to say that the vast majority
3 of those are not as Mr. Schaeffer characterizes them,
4 admissions of the parties. Many of them are newspaper
5 articles that have absolutely nothing to do with any
6 of the parties; that were not printed, created -- have
7 nothing -- no involvement by NPR or PBS.

8 There are questions as to whether -- by
9 individual stations which are not frankly parties to
10 this proceeding constitute admissions against PBS and
11 NPR in this proceeding against ASCAP.

12 What, in essence, ASCAP is asking you to
13 do is take exhibits such as this, hundreds of pages of
14 -- we frankly can't tell what the relevance is of
15 documents such as this -- boxes and boxes of these
16 kinds of documents that we have no -- frankly, no
17 ability to cross examine anyone on as to either their
18 relevance, their significance to this proceeding, how
19 we can -- we don't even know how we could possibly
20 respond to them.

21 I think that the rules specifically
22 require a sponsoring witness. Clearly the reason for

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1 that is so that somebody can tie together a massive
2 paper with the -- for the record to enable Your Honors
3 to make a reasoned decision as to what a fee should be
4 in this proceeding.

5 CHAIRPERSON GRIFFITH: Was this matter
6 heard by the Copyright Office in the proceedings?

7 MR. WEISS: It was heard by the Copyright
8 Office. And the Copyright Office, I believe, allows,
9 in the ordinary course, the parties to renew motions
10 after examination, cross examination.

11 CHAIRPERSON GRIFFITH: They denied the
12 motion and then you renewed it?

13 MR. WEISS: Correct.

14 JUDGE GULIN: Judge Griffith, I think what
15 the Copyright Office said was that the motion to
16 strike the testimony and certain exhibits sponsored by
17 Carol Grajeda are denied. They go on to say
18 determinations as to links, efficiency and
19 admissibility of the evidence are properly made by the
20 CARP.

21 I read that, frankly -- the way I
22 interpret it is that they are essentially deferring

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1 the matter to the CARP to be decided. Although, the
2 decline to grant the motion at the time it was made.

3 MR. WEISS: Frankly, that's the way we
4 read it as well, Your Honor, which is why we renewed
5 the motion.

6 CHAIRPERSON GRIFFITH: Mr. Schaeffer?

7 MR. SCHAEFFER: Well, my position is that,
8 like any other proceeding -- first of all, this is
9 documentary material and our hands are tied behind our
10 back unless we can introduce documentary material.

11 As to the relevance of the matters, that
12 will be for opening statements -- for closing
13 statements, briefing, for use with witnesses, for
14 cross examination of their witnesses, for a whole
15 variety of different purposes.

16 Each instance -- I think that Mr. Weiss is
17 being a little disingenuous. Most of the material
18 that you have goes to the financial operations and the
19 financial success of the particular stations and PBS
20 and NPR and the related entities.

21 It would all really buttress exactly what
22 Mr. Ledbetter testified to this morning. Namely it

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1 describes the economics of the public broadcasting
2 industry in great detail.

3 We deal here with a matter of great moment
4 to all four parties, and it would be completely
5 impossible for us to prove our case, I think -- or at
6 least it would be extremely difficult in the absence
7 of their voluntarily disclosing into the CARP the very
8 things that we have to rely on to describe the seed
9 change which we have previously shown.

10 Certainly there can be no damage to anyone
11 if the truth gets out. And if the documentary
12 materials which, by and large, they produced the bulk
13 of, have on the Web site, have given to the public is
14 before you.

15 JUDGE GULIN: Mr. Weiss, as to the
16 documents that are public record documents, --

17 MR. WEISS: We have no objections to those
18 coming in.

19 Frankly, Your Honor, there are several
20 documents in here that -- a couple of documents Mr.
21 Schaeffer mentioned Mr. Ledbetter. There are,
22 frankly, a couple of pages of documents of the Current

1 articles that Mr. Ledbetter cites to in his testimony.

2 As to those, I'm perfectly willing to ask
3 to have ASCAP amend its testimony as to Mr. Ledbetter
4 to have him act as the sponsoring witness for those
5 articles, at which point we would then have to take a
6 look at those particular articles to determine whether
7 there are other grounds for objection such as hearsay,
8 which frankly I don't think we need to spend a lot of
9 time on now.

10 But that's precisely the point. There are
11 witnesses available to ASCAP who could, if these are
12 relevant to this proceeding, sponsor them.
13 Unfortunately, Ms. Grajeda is not that witness.

14 MR. SCHAEFFER: Let me give you an
15 example. Some of the material here is the
16 solicitation manuals that the Corporation for Public
17 Broadcasting has developed.

18 JUDGE GULIN: Well, let me get to that.
19 Some of the documents would appear to be admissions,
20 party admissions. I agree that there still has to be
21 a sponsoring party even for party admissions.

22 But ASCAP could have used a number -- or

1 will be able to use, in all likelihood, a number of
2 your witnesses in order to sponsor the documents. So,
3 as a matter of practicality, are you going to object
4 to those being admitted?

5 MR. WEISS: If they come in through a
6 proper sponsoring witness, absolutely not, Your Honor.

7 The problem is -- I mean, I'll tell you
8 frankly, there are 137 documents --

9 JUDGE GULIN: I know.

10 MR. WEISS: -- consisting of most of the
11 three boxes that we have on this back table here. I
12 haven't even read every page of that because I haven't
13 had time to. If a particular witness is being asked
14 questions about a particular document, the likelihood
15 is we will not object.

16 Certainly if it's a PBS or NPR created or
17 CPB created document, we won't object to it coming in
18 if there's an appropriate sponsoring witness.

19 Frankly, we haven't had the time or the
20 inclination to try to even go through that exercise
21 given the way ASCAP is trying to dump in this massive
22 information.

1 JUDGE GULIN: Well, I think it is a matter
2 of some import not only to this proceeding, but for
3 future CARP proceedings, to determine what it really
4 means to sponsor a document.

5 Mr. Schaeffer, it seems to me that your
6 definition is extremely broad as to what it means to
7 sponsor a document. Basically it means the person who
8 goes out and retrieves the document can sponsor a
9 document.

10 Do you think that's what was envisioned by
11 the rules?

12 MR. SCHAEFFER: I think what was
13 envisioned was a sponsoring witness would, by and
14 large, authenticate a document. I think we're talking
15 here about authentication. There's no definition of
16 sponsoring meaning that you have to establish the
17 relevance. Nothing in the rules says that.

18 And to be perfectly honest, if we go
19 through the list for a minute, you'll see they're
20 objecting to the Corporation for Public Broadcasting
21 1996 Public Broadcasting Directory, for example.

22 How can they object to that? Preliminary

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1 Report, Public Broadcasting Revenue, Fiscal 1995 --
2 how can they object to that? How can you be denied
3 that?

4 JUDGE GULIN: Well, I'm not --

5 CHAIRPERSON GRIFFITH: We don't want to
6 get into the individual --

7 JUDGE GULIN: Yes, I want to speak
8 philosophically about --

9 MR. SCHAEFFER: But philosophically, it
10 seems to me the important point is, if we can
11 establish some degree of relevance from the document
12 itself, which is the appropriate way to do it -- we
13 are not the authors of these documents.

14 And to put upon us the burden of us being
15 the authors, it doesn't make any sense. On the other
16 hand, this arbitration certainly -- or these CARP
17 arbitrations can't be so blind sided that the evidence
18 be so limited that admissions, that the common sense
19 of the industry, Current magazines, which is a
20 newspaper that is owned by a cooperative, the public
21 broadcasting stations themselves -- when they run
22 stories, they're talking about themselves.

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1 And when the stations, for example, run a
2 Web site and tell you how much they should be
3 collecting and all the rest of it, surely you
4 shouldn't be denied that information.

5 Now it seems to me there is nothing in the
6 word sponsoring witness that indicates it's anything
7 but authentication and telling you what the source is.

8 JUDGE GULIN: How about if you take a look
9 at Section 251.43(b).

10 MR. SCHAEFFER: Forgive me, I've just got
11 to get the list.

12 Yes.

13 JUDGE GULIN: Do you see that?

14 MR. SCHAEFFER: The written, direct case
15 shall include all testimony including witness
16 background qualifications?

17 JUDGE GULIN: Along with all the exhibits
18 to be presented in a direct case.

19 MR. SCHAEFFER: Yes.

20 JUDGE GULIN: Does it sound like there's
21 some nexus being made here between the qualifications
22 of a witness and the documents or exhibits that that

1 --

2 MR. SCHAEFFER: I don't read it that -- I
3 read it quite the contrary, that what -- the written,
4 direct case shall include all testimony, including the
5 witness background and qualifications, which anybody
6 would give, along with -- means the exhibits to be
7 presented.

8 It's a separate category. I don't see
9 that one qualifies the other.

10 JUDGE DREYFUS: Well, on 251.48, rules of
11 evidence, says documentary evidence --

12 MR. SCHAEFFER: Let me just get to that.

13 JUDGE DREYFUS: (b), by the way.

14 MR. SCHAEFFER: 251.48(b).

15 JUDGE DREYFUS: Evidence that is submitted
16 in the form of documents are detailed data and
17 information shall be presented as exhibits relevant in
18 the material matter embraced in a document containing
19 other matter not -- or not intended as evidence must
20 be plainly designated as a matter -- as the matter
21 offered in evidence.

22 MR. SCHAEFFER: Well, but what -- the

1 stuff we're offering --

2 JUDGE DREYFUS: In other words, --

3 MR. SCHAEFFER: Well, we made the
4 selections so that you wouldn't have to be burdened
5 with -- for example, the Web site on something may be
6 100 pages. I haven't given you 100 pages of every Web
7 site; I've only given you the relevant excerpts.

8 On the Current magazine excerpts, I
9 haven't given you the whole Current magazine; I've
10 given you the excerpts themselves. Why should you
11 labor through all that which I think is irrelevant
12 anyway?

13 MR. WEISS: Your Honors, I'm not sure I
14 can divine the relevance to this proceeding of a Web
15 site page. This is Exhibit 325, page 149.

16 "Lotus Notes 3.0, discover the power of
17 Lotus Notes, the software that allows teams of people
18 to collect, share and revise information. Say what
19 you mean, get what you want, three minute video clip."

20 I have no idea what this has to do with
21 relevance.

22 MR. SCHAEFFER: It's perfectly clear.

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1 It's an advertised --

2 MR. WEISS: Frankly, if I may finish, Mr.
3 Schaeffer.

4 Mr. Schaeffer would put the burden on Your
5 Honors and on us to try to divine the relevance.
6 Frankly, the whole adversary process here is designed
7 to allow the witnesses to tell us why they're relevant
8 and not require us to simply guess at that.

9 MR. SCHAEFFER: On the contrary, it will
10 be my obligation to do that in the brief or you'll
11 just ignore it, just as you would in a conventional
12 lawsuit.

13 JUDGE DREYFUS: Excuse me, if I can finish
14 reading the sentence.

15 MR. SCHAEFFER: Sure, I'm sorry.

16 JUDGE DREYFUS: Because here's the answer.
17 Now I lost the place.

18 "And the immaterial or irrelevant parts
19 shall be marked clearly so as to show they are not
20 intended as evidence."

21 So if you have a document in bulk, it's
22 your obligation to mark the irrelevant or immaterial

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1 matters so that it doesn't clutter the record.

2 MR. SCHAEFFER: Well, but what --

3 JUDGE DREYFUS: Now if you say that the
4 entire bulk is relevant -- I mean, if that's your
5 position, that means you've read the whole document
6 and you agree with that.

7 MR. SCHAEFFER: I mean, fortunately or
8 unfortunately, we have read the whole document. I
9 think almost all of them. The rest of -- the other
10 lawyers have certainly done it. And my intention
11 would be to cite chapter and verse to you in the
12 enormous -- what I think is kind of lost sight of it
13 is Public Broadcasting is an enormous enterprise.

14 Their economics are enormous. And it's
15 been repeated over and over again station by station
16 in all of this material how commercial they are, and
17 that's the reason we presented the material. We
18 haven't presented any material we don't think is
19 relevant.

20 JUDGE DREYFUS: By the way, one of the
21 problems we're having here is that they've been
22 offered as numbers.

1 MR. SCHAEFFER: Yes.

2 JUDGE DREYFUS: And then the motion is --
3 the motion to strike has numbers. We don't know what
4 the categories are, how many of these documents and
5 which ones were prepared by PBS or television station
6 members of PBS, so forth.

7 We don't know the answer to that. We
8 don't know how many are annual reports. We don't know
9 how many are articles and written by whom and so
10 forth. And so those have to be categorized.

11 And by the way, if you don't know the
12 relevance, perhaps at a break you can -- counsel can
13 get together and he can show you the relevance. And
14 so maybe things will fall away in that way.

15 MR. SCHAEFFER: They are categorized by
16 number. I mean, they're in groups.

17 MR. WEISS: Unfortunately, Your Honor, I
18 can't cross examine Mr. Schaeffer, as much as he might
19 want to testify. If I have a witness on the stand
20 claiming the relevance, I'll be able to cross examine
21 that witness.

22 JUDGE GULIN: I think that's the point,

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1 Mr. Schaeffer. That's the whole idea of a sponsoring
2 witness is to be there to establish some nexus between
3 this case and the documents that are being put into
4 evidence.

5 MR. SCHAEFFER: What you're doing there is
6 saying, in effect, that the only person that would be
7 capable of establishing the relevance is counsel.
8 Because it's for me to tell you, in my briefs and my
9 arguments, why the facts are relevant.

10 So what really is being suggested --
11 certainly I could put Ms. McGivern on the stand and
12 say with respect to these documents which are out
13 there and publicly available, and they all are
14 publicly available -- you couldn't get anything in
15 private -- why it's relevant or not.

16 But that's precisely the point of the
17 advocate in the case. And so what you're saying is,
18 in a CARP, you can't effectively use a document -- a
19 preexisting document that reflects on the matter
20 without putting the counsel on the stand.

21 Because it's only the counsel who could
22 establish its relevance.

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1 CHAIRPERSON GRIFFITH: Mr. Schaeffer, the
2 direct testimony of the witness, from that, the
3 inference is that the exhibits which are admitted with
4 that witness' testimony is that the witness has relied
5 on those particular exhibits to buttress --

6 MR. SCHAEFFER: Yes, of course.

7 CHAIRPERSON GRIFFITH: -- in support of
8 their case.

9 MR. SCHAEFFER: But there is some material
10 that -- this is a case -- when a party -- let's take
11 -- let me give a good example. We've got from PBS a
12 series of booklets, so-called info information which
13 describe in great detail how to get more money out of
14 the membership, what kind of programs to run, the
15 famous Lawrence Welk Show being prominently -- and all
16 that.

17 I haven't invented that document. I
18 haven't prepared that document. Nobody knew about
19 that document until we ordered it from PBS because it
20 appeared on the Web site. Now, in order to establish
21 the relevance of that document, I certainly wouldn't
22 put a paid expert on the stand who would then look and

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1 say I've never seen the document before; I guess it's
2 relevant or not.

3 The only one who can do that for you is
4 counsel. Conventionally, counsel does that in the
5 form of argument. If we're suggesting --

6 CHAIRPERSON GRIFFITH: But if you got that
7 document and you gave it to the -- your expert before
8 the CARP convened and began the hearing, and the
9 expert says yes, I could testify to that or I'm going
10 to rely on it, then that's how it comes in.

11 MR. SCHAEFFER: But it seems to me that
12 that is the most cumbersome -- and all we're talking
13 about is documents that have their own life. To have
14 the expert get on the stand and say this is a document
15 that has its own life and I will now summarize it for
16 you is exactly what counsel does.

17 JUDGE GULIN: May I make a suggestion?

18 It sounds like --

19 CHAIRPERSON GRIFFITH: Wait a minute.

20 MR. KLEINBERG: Can I be heard --

21 JUDGE GULIN: Sure.

22 MR. KLEINBERG: -- first on this because

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1 it affects me to a certain extent. I don't have ten
2 boxes of documents, but I have some documents that fit
3 into the same category in a sense.

4 And it strikes me that it may be helpful
5 to evaluate the kinds of documents we're talking
6 about. On the one hand, documents that, in the normal
7 court proceeding, qualifies admissions, statements
8 that come out of the parties' own mouth in terms of
9 writings in a normal proceeding can be admitted into
10 evidence without the person from the other side.

11 I mean, they --

12 JUDGE DREYFUS: Well, that's one of the
13 categories.

14 MR. KLEINBERG: That's one of the
15 categories. It might be helpful to cull down from
16 this group of 137 what we're really talking about. If
17 it's newspapers articles or articles in journals, for
18 example, those are items that can customarily come in
19 under the normal rules of evidence -- the more
20 stringent rules, I might add -- if they are deemed to
21 be sufficient documents that people rely upon in the
22 industry in question -- for example, the television

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1 business or the public broadcasting business.

2 But to say that you need to have a
3 sponsoring witness, meaning someone who can actually
4 say I've read that document and can be cross examined,
5 I think is not the evidentiary rules in any
6 proceeding, let alone in an arbitration proceeding.

7 And it would unnecessarily prolong the
8 process to indeed require that in every case. And I
9 also think it leaves all of us in the quandary of what
10 happens if the Corporation for Public Broadcasting
11 doesn't appear, which in fact is the case.

12 There is no witness from them, from the
13 Corporation --

14 CHAIRPERSON GRIFFITH: Is it for us to
15 receive 131 or two or however many documents there
16 are, and sort through and determine the relevancy or
17 --

18 MR. SCHAEFFER: No, it's for us to do
19 that, Your Honor, just as we would do in a trial.
20 What would happen in trial, if you could put in
21 admissions, and it's a commonplace of doing that,
22 that's counsel's job.

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1 If we don't indicate to you why it's
2 relevant, you'll just ignore it. Nobody's suggesting
3 for a minute that you do the culling. The question is
4 whether or not -- whether the lawyer does it or the
5 witness does it.

6 CHAIRPERSON GRIFFITH: Well, you say we
7 can just ignore it, but isn't it the standard way to
8 determine the relevancy and its admissability and then
9 offer it?

10 MR. KLEINBERG: Normally, Judge, I believe
11 that when you offer the document, the other side says
12 objection, what ground, relevance. Then there's a
13 colloquy between counsel about relevance.

14 Here we're taking them all at once. I
15 can't believe there are relevance objections or
16 authenticity objections on every single one of these
17 documents.

18 CHAIRPERSON GRIFFITH: No, they don't
19 contend that, I don't think.

20 MR. WEISS: We're not contending it.
21 First, Mr. Kleinberg, I think, is a little bit too
22 self effacing. Frankly, I'm not sure there were any

1 documents that BMI sought to include into this
2 proceeding that are of this ilk.

3 Frankly, all of the documents that BMI
4 cites to, as far as I can recall, had an appropriate
5 sponsoring witness. That doesn't necessarily mean
6 that we agree that they all should be admissible. But
7 nevertheless, they had an appropriate sponsoring
8 witness.

9 And though we can talk about what the
10 rules are in Federal Court, what the rules are in
11 typical state case, what the rules are in the typical
12 arbitration, I'm simply talking about what the rules
13 are in this proceeding.

14 And this proceeding requires a sponsoring
15 witness. And having this witness sit on the witness
16 stand and throw in 137 exhibits without giving any
17 indication as to why they're relevant to me is a
18 travesty, and it's not -- and it's contrary to the
19 very rules.

20 MR. SCHAEFFER: Let me give you a classic
21 example.

22 We have no discovery rights here. If we

1 wanted to get the financial report from WNET,
2 certainly an important issue in this case, how do we
3 do it except in this manner?

4 JUDGE GULIN: We're not talking about how
5 you obtain documents. We're talking about how to get
6 documents into evidence.

7 MR. SCHAEFFER: Well, but --

8 JUDGE GULIN: You have a sponsoring
9 witness.

10 MR. SCHAEFFER: But what is he sponsoring?
11 He says --

12 JUDGE GULIN: The witness who somehow ties
13 in every document which you offer in your written case
14 into your case. Ties it in in some manner.

15 MR. SCHAEFFER: But I can do that today
16 and put Ms. McGivern on. But essentially, that's
17 counsel -- isn't that counsel's work?

18 MR. WEISS: I'm not sure that we would
19 concede that Ms. McGivern is an appropriate sponsoring
20 witness either. Mr. Ledbetter was on this morning.

21 Mr. Schaeffer's already admitted that
22 several of the documents that we're talking about here

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1 are documents that he relies on in his ordinary
2 course. Why wasn't he the sponsoring witness?

3 I'm perfectly prepared to those kinds of
4 documents to have them amend their case, make Mr.
5 Ledbetter the appropriate sponsoring witness for
6 certain of those documents that he's competent to be
7 the sponsoring witness on.

8 And then, if we have objections, we'll
9 raise the objections at that point.

10 JUDGE GULIN: It's fairly clear that only
11 a small portion, it sounds like, of the documents are
12 ultimately going to be in question here, at issue.

13 Would it be possible for counsel to get
14 together on this and decide which documents --

15 MR. SCHAEFFER: Certainly we'd try.

16 JUDGE GULIN: -- you're going to stipulate
17 to? Because many of them are documents that we can
18 take official notice of. Many of them are documents
19 which would come in at some point during the PBS case.

20 MR. SCHAEFFER: Excuse me.

21 That's the other aspect of it that's so
22 crazy. Take some of the examples where I've talked

1 about the info information that CPB provides which is
2 critical to our case because what it shows is that
3 there's a program by Corporation for Public
4 Broadcasting, both the National Public Radio and with
5 PBS, to how they should go about using our music for
6 the purpose of getting funds.

7 JUDGE GULIN: Right.

8 MR. SCHAEFFER: Now, if they don't choose
9 to put in a witness who can identify that document,
10 then does that mean I'm barred from using the
11 document? Because surely --

12 JUDGE GULIN: You could have put in a
13 witness to use that document.

14 MR. SCHAEFFER: Well, what would the
15 witness say? What would the witness say that's
16 different than Ms. Grajeda; that this is a document
17 that comes from CPB, which is what she's already said
18 and which is what I've already indicated, and which is
19 here -- what else would she say?

20 JUDGE GULIN: She would say what the
21 relevance of the document is, what it means, what it
22 has to do with this case.

1 MR. SCHAEFFER: Then that's what the
2 lawyer -- isn't that what the lawyer does?

3 JUDGE GULIN: That's what normally the
4 lawyer would do in Federal Court, but we're in a
5 different proceeding here. And I think the rules are
6 fairly clear. I think the word sponsoring a document
7 has some meaning.

8 MR. SCHAEFFER: Well, --

9 JUDGE GULIN: And it's not simply to come
10 in and say that this is in fact the document that I
11 found in the newspaper on a particular day. I think
12 it's something beyond that.

13 MR. SCHAEFFER: Well, then I would ask for
14 an opportunity, frankly, to put Ms. McGivern on the
15 stand. And she will go through the documents and say
16 how they're relevant.

17 JUDGE GULIN: Why don't we start out by
18 having counsel, if the Panel agrees, get together and
19 try to find out what documents really are --

20 MR. SCHAEFFER: Let me tell you why I
21 think this is come up at this point and why this is a
22 particular problem.

1 Most of these proceedings don't involve
2 disputed issues of fact. I don't know, but I suspect
3 from what I've read of past CARP's, here we have a
4 situation where the performing rights organizations
5 are saying that there has been a change in the nature
6 of commercial -- of public broadcasting.

7 The only -- that's an issue of fact, one
8 which would be difficult even in a Federal Court to
9 show. And so in order for us to prove that, we can't
10 -- I can put an expert on the stand who will give you
11 his scholar's view; but quite rightly then, somebody
12 will say the scholar has one view, what's the facts,
13 what's he base it on.

14 And we have here overwhelming evidence of
15 this seed change that Mr. Kleinberg and I have
16 described. Now, what I would propose to do, if
17 everybody would feel more comfortable with it, I
18 certainly will sit down and try and stipulate to
19 things.

20 But to things we can't agree to, I think
21 the only way I can do this is to have Ms. McGivern get
22 on the stand and -- she's not trying the case so it's

1 not a terrible problem and there's no ethical bar to
2 that.

3 And I'll have her testify as to why each
4 of these items are relevant to the issues we've
5 described. It's the only other thing I could think.
6 I'm surprised that I have to do it, but I'll be glad
7 to do it.

8 JUDGE DREYFUS: Excuse me.

9 MR. SCHAEFFER: Sure.

10 CHAIRPERSON GRIFFITH: How long do you
11 anticipate it would take you all to go through those
12 documents together?

13 MR. SCHAEFFER: I could do it an half
14 hour. And we could at least know what our
15 disagreements are.

16 MR. WEISS: The only problem, frankly,
17 Your Honors, is, as to certain of the documents, I'm
18 not sure that I'm going to be competent myself to
19 know, as an example, if it's a CPB, PBS and NPR
20 created document.

21 I just may not know. And I may need to
22 consult with my client as to some of those.

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1 CHAIRPERSON GRIFFITH: Well, maybe I'm
2 getting the wrong impression. I thought we probably
3 were going to end up with ten or 12 or something like
4 that that are actually in contest.

5 MR. WEISS: I'm not sure that that's --

6 CHAIRPERSON GRIFFITH: You don't know?

7 MR. WEISS: -- accurate, Your Honor.

8 MR. SCHAEFFER: What we've done is we've
9 gone to the Web sites of the stations -- the PBS and
10 NPR are really representing the stations. And the
11 stations have an enormous amount of information about
12 soliciting money and soliciting advertising, and that
13 stuff is obviously highly relevant.

14 At least we think it's highly relevant
15 because that's what's going on out there. That's what
16 shows the commercial nature of public broadcasters.

17 CHAIRPERSON GRIFFITH: Let me do one
18 thing. I'm trying to save time, but I'm not sure how
19 to do it at the moment.

20 JUDGE DREYFUS: What's our schedule for
21 this point?

22 MR. SCHAEFFER: We have one person, Mr.

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1 Bergstein, left who can testify -- I don't know what
2 his schedule is. He's sitting in the back. I don't
3 know how long the testimony --

4 CHAIRPERSON GRIFFITH: All right, we will,
5 at this point, reserve ruling on the motion. And we
6 will direct counsel to, at the earliest possible
7 moment, to get together, go through the exhibits which
8 are seeking to be admitted, and then inform the Panel
9 as to which exhibits you agree can be admitted and the
10 reason therefore.

11 And the ones that you do not, we will hear
12 you out on them and determine whether or not they are
13 admissible.

14 MR. WEISS: Rather than -- that's fine,
15 Your Honor, with us.

16 CHAIRPERSON GRIFFITH: Okay.

17 Any questions?

18 MR. SCHAEFFER: No, Ms. McGivern is just
19 pointing out to me that the -- in many instances, the
20 relevance of the material is obvious from the title.
21 But the procedure that we've talked about is fine with
22 us, and then we can -- one of the issues will be to

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1 what extent we can use the Web -- the stations
2 themselves admissions, which seems to be pretty --

3 MR. WEISS: Well, which raises the very
4 question as to whether the stations themselves are
5 parties, which we're not conceding at this point. And
6 therefore, they wouldn't constitute --

7 MR. SCHAEFFER: It might help to have a
8 ruling on that in advance because that would expedite
9 our discussions. Our position is that the people who
10 should be paying this are the stations. What we've
11 been talking about all the time are the stations.

12 It's the stations --

13 JUDGE DREYFUS: Well, is the question of
14 what the individual stations are doing to raise money
15 for themselves, is that part of this case?

16 MR. SCHAEFFER: Yes, as far as we're
17 concerned. Well, you heard Ledbetter. For us, it's
18 a critical part of the package. PBS is just a service
19 organization. NPR is just a service organization.
20 They aren't --

21 MR. WEISS: PBS and NPR are the parties to
22 this proceeding.

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1 MR. SCHAEFFER: But that's only because
2 Congress appointed --

3 MR. WEISS: The stations --

4 MR. SCHAEFFER: Just let me finish.

5 MR. WEISS: The stations themselves are
6 not parties to this proceeding.

7 MR. KLEINBERG: May I say something? The
8 stations are the licensees, 118(g).

9 CHAIRPERSON GRIFFITH: Right.

10 MR. KLEINBERG: They are the licensees.

11 MR. SCHAEFFER: How do you think you had
12 --

13 MR. KLEINBERG: Therefore, to suggest that
14 they're not part of this proceeding, I think, is to
15 blink reality since they are the ones that are in fact
16 licensed as a result of whatever ruling comes out of
17 here pursuant to the compulsory license that Congress
18 has authorized.

19 MR. WEISS: I could say the same thing
20 about the 70,000 ASCAP composer members and the 70-
21 plus thousand BMI composer members, and that would
22 suggest that every statement that they make

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1 constitutes a party admission in this proceeding.

2 I dare say that neither of my opponents on
3 the other side of the floor here would take that
4 position.

5 MR. SCHAEFFER: Well, but the statute says
6 in this case that we, the PRO's, are to license the
7 stations. And when we bring out that thing I've been
8 showing all the time about the license, it licenses
9 the stations. NPR and PBS are just agents for the
10 stations.

11 CHAIRPERSON GRIFFITH: All right, well let
12 -- we've made a ruling with respect to the motion
13 which has been made.

14 Now this next thing that you're asking us
15 to do is what?

16 MR. SCHAEFFER: Well, the question that
17 would guide us considerably -- we believe that
18 material that has been produced by the local stations
19 is, in the same nature, are admissions.

20 I just don't -- it isn't just CPB and PBS
21 and the studies they've sponsored, but also the
22 stations themselves so you see what they're actually

1 doing. That's what the bulk of the material is.

2 CHAIRPERSON GRIFFITH: All right, what's
3 your position with respect to that?

4 MR. WEISS: I'm sorry, I missed the last
5 point.

6 MR. SCHAEFFER: Much of the material comes
7 from the Web sites of the local stations and describes
8 their efforts to get underwritings and to get money
9 and their commercial aspects, and we believe that's
10 highly relevant and constitutes admissible evidence.

11 JUDGE DREYFUS: Yes, but that's -- I agree
12 with that last statement, but it's not the statement
13 you made before, okay, where you said that the
14 individual -- the comments of the individual --
15 publications by the individual stations would be an
16 admission against interest against PBS.

17 That's what you said in your --

18 MR. SCHAEFFER: Well, but I think it is
19 the truth because what happens is that the -- in
20 describing the -- NPR and PBS themselves aren't paying
21 the money. They're not our licensees. It's the
22 licensees of the station.

1 MR. RICH: Mr. Schaeffer just has all the
2 facts wrong unfortunately. The fees are paid entirely
3 by PBS and NPR. They are the contracting entities
4 with ASCAP and BMI. We are not counsel in this
5 proceeding for 300 local television -- public
6 television stations; we are counsel for PBS and NPR.

7 I can't concede that a Web page entry by
8 a station in Keokuk, Iowa is going to be an admission
9 against PBS or NPR no matter how relevant it might be
10 in this case.

11 JUDGE DREYFUS: We understand that, but --

12 MR. SCHAEFFER: But their own financial
13 statements --

14 JUDGE DREYFUS: -- it still may be
15 relevant to the case.

16 MR. SCHAEFFER: But their own financial
17 statements which they have given us don't list PBS's
18 and NPR's revenues; they list the revenues for all the
19 stations.

20 MR. RICH: Judges, if I may. I'm sorry,
21 I know this has gone too long.

22 But we have the same frustrations Mr.

1 Schaeffer does, but they're imposed by the discovery
2 rules of this case. There are probably 300 documents
3 I can almost name off the top of my head which, if we
4 had full discovery, I would want from ASCAP's and
5 BMI's files because they're relevant.

6 We were limited, by definition, to
7 documents underlying parties' cases. And as I read
8 251.48, that's the documentary evidence we talked
9 about in (b) and then supplemented by (c) and (d),
10 such documents as (a) are filed with the CARP or the
11 Copyright Office, and (b) public documents which are
12 specifically defined as of an official nature, à la
13 the kinds of court decisions we've been putting in.

14 This is not, by nature, a "let it all hang
15 out" proceeding, toss in whatever you want. The whole
16 purpose of the CARP was to constrain that process, not
17 to deal with guessing about what three boxes have that
18 might be relevant.

19 MR. SCHAEFFER: But how are we to
20 determine an issue of fact?

21 CHAIRPERSON GRIFFITH: All right, we're
22 going to take a ten minute recess. We'll be right

1 back.

2 (Whereupon, the foregoing matter went off
3 the record at 4:36 p.m. and went back on
4 the record at 4:47 p.m.)

5 CHAIRPERSON GRIFFITH: Ladies and
6 gentlemen, I would like to recognize one of my
7 colleagues who is going to resolve this whole matter
8 with you.

9 JUDGE GULIN: I'm not sure how much
10 guidance we can offer to you. As we said, we're going
11 to reserve on this. The Panel seems to feel that, in
12 order for a document to come in under written direct,
13 there must be a sponsoring witness within the meaning
14 that I expressed before we broke.

15 Now documents can still come in at a later
16 time at the hearing; but again, there has to be a
17 witness to sponsor unless the Panel takes official
18 notice of it. So on cross examination, for example,
19 a document which was put out by PBS is almost
20 certainly going to come in on cross examination.

21 Now, I think you were looking for some
22 guidance as to documents that are produced by local

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1 stations. Whether or not they constitute an
2 admission, a party admission, is not the test here as
3 to whether they're going to come in to evidence.

4 The test is whether there is some witness
5 that can sponsor it.

6 So that's about all the guidance we can
7 give you. Certainly it sounds like those types of
8 documents would be relevant if you have documents as
9 to -- that are produced by local stations which
10 discuss fund raising.

11 They certainly sound relevant. But again,
12 the question is whether they're going to be admitted
13 because there's some witness that can sponsor it. And
14 it's conceivable that that could happen on cross
15 examination even though they're not here.

16 We're not going to rule on that in
17 advance.

18 MR. SCHAEFFER: May I ask -- if you're
19 finished, I have one other inquiry.

20 It is possible, on rebuttal of the case,
21 to bring in a sponsoring witness who will be able to
22 meet these requirements, I assume?

1 JUDGE GULIN: That's right.

2 MR. SCHAEFFER: So I assume, to some
3 extent, depending if, for example, PBS says that they
4 are not soliciting advertising or they're not doing
5 something different, I assume at that point, in
6 addition to cross examining, since I may not -- the
7 PBS person saying I know nothing about local stations,
8 I can at least bring in Mr. Ledbetter back and I will
9 have Mr. Ledbetter say look, this is on the Web and
10 this indicates to me that they're doing it.

11 And if that's the ruling, I have -- to
12 some extent, going up the hill to go down the hill.

13 JUDGE GULIN: It may work out that way.

14 MR. SCHAEFFER: Okay.

15 JUDGE GULIN: Mr. Ledbetter or someone
16 else --

17 MR. SCHAEFFER: Yes.

18 JUDGE GULIN: -- that you will identify
19 during the rebuttal phase. And it will be sponsored
20 by Mr. Ledbetter or whomever.

21 Okay, but, of course, we're not making any
22 ruling today --

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1 MR. SCHAEFFER: No, no; I understand.

2 JUDGE GULIN: -- on that.

3 So I think these are things to keep in
4 mind when you engage in your negotiations as to which
5 documents you're going to stipulate to.

6 MR. SCHAEFFER: I think that was very
7 helpful. Thank you. I know I feel greatly
8 enlightened.

9 JUDGE GULIN: All right.

10 MR. WEISS: Thank you, Your Honors.

11 CHAIRPERSON GRIFFITH: Thank you.

12 MR. SCHAEFFER: Should we finish with the
13 last witness because he's here?

14 CHAIRPERSON GRIFFITH: May we excuse this
15 witness?

16 MR. SCHAEFFER: As far as I'm concerned,
17 yes.

18 CHAIRPERSON GRIFFITH: Any further
19 questions of this witness?

20 MR. WEISS: No further questions, Your
21 Honor.

22 MR. MOSENKIS: Ma'am, you may step down.

1 You are free to go. And I don't know of any other
2 witness who has caused such an uproar for a period of
3 time.

4 THE WITNESS: Then I did my job.

5 (Laughter.)

6 MR. SCHAEFFER: That's what you think.
7 Now you see why she got promoted.

8 (Laughter.)

9 (The witness was excused.)

10 MR. SHORE: The last witness is Mr.
11 Bergstein.

12 CHAIRPERSON GRIFFITH: All right.

13 Whereupon,

14 ED BERGSTEIN

15 was called as a witness and, after having been first
16 duly sworn, assumed the witness stand, was examined
17 and testified as follows:

18 DIRECT EXAMINATION

19 BY MR. SHORE:

20 Q Hi, Ed.

21 A Hi.

22 Q Would you please introduce yourself to the

1 arbitrators?

2 A My name is Ed Bergstein. I'm a senior
3 vice president of Audits and Surveys Worldwide in New
4 York.

5 Q And could you explain to the arbitrators
6 what Audits and Surveys is?

7 A Audits and Surveys is one of the largest
8 market research firms in the country, probably in the
9 top 12 or 13. We consider ourselves one of the most
10 highly prestigious firms also in the country. And we
11 conduct -- actually, the company has two major
12 divisions, an audits division and a survey division.

13 I'm a vice president -- senior vice
14 president head one of the groups in the survey
15 division. And we conduct various surveys of consumer
16 attitudes, consumer behavior, business behavior, etc.

17 Q What are your duties as a senior vice
18 president?

19 A As a senior vice president, I co-head my
20 group which is involved in various types of research,
21 media research, sports research, health research, etc.
22 I sell most of the business for my particular group.

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1 I oversee project directors within the group.

2 I design surveys, provide client service
3 and basically do the various analyses and
4 presentations where they're required.

5 Q How long have you been with Audits and
6 Surveys?

7 A Nearly 15 years.

8 Q And in that time, how many surveys have
9 you been involved in?

10 A I'd say probably well over a thousand.

11 Q And how many of those have been media
12 related?

13 A I'd say several hundred, at least.

14 Q What role did you have in the survey
15 report which is attached to your written testimony in
16 this case?

17 A Well, I designed the survey and oversaw
18 the administration of it. I had a project director
19 who did the day to day, and I did the analysis and
20 report.

21 Q Who did you survey in the report?

22 A We went into seven of the ten largest PBS

1 markets in the country, and we surveyed 750
2 individuals in those markets split basically equally,
3 107 or 108 per market.

4 We screened for people who were adults,
5 ie. 18 plus years of age, and people who had watched
6 at least an hour of PBS programming in the previous
7 month on the given channel in their market, the
8 largest PBS channel in their market.

9 Q How were the interviews of these
10 respondents conducted?

11 A They were conducted by telephone. Audits
12 and Surveys has a computer assisted telephone
13 interviewing system. We have phone centers in three
14 locations around the country.

15 And basically the procedure is we use
16 random digit dialing for these which, in effect, means
17 you have actual exchanges and randomized numbers so
18 that people who have unlisted or listed numbers have
19 an equal chance of falling into the sample so there's
20 no bias in terms of the individuals who come in.

21 Basically you have interviews sitting at
22 computer terminals with phones. The numbers come up

1 randomly. They do the dialing. The questions come up
2 on the screen. In this case, we screened for people
3 who were 18 plus years of age and also had watched at
4 least an hour of PBS programming.

5 If those people qualified, the
6 questionnaire goes on and asks the questions in their
7 proper sequence and randomizes questions where
8 appropriate. If the person doesn't qualify, it
9 terminates them with thanks and a new number comes up.

10 Q Okay, would you please describe the
11 questionnaire you are talking about?

12 A The questionnaire basically -- not a very
13 long questionnaire. It was in four parts essentially.
14 The first part is what we call the screening form
15 where we asked whether there were any people in the
16 household 18 plus years of age.

17 If there are more than one, we randomly
18 select one. Then we also made sure that the person
19 had to qualify in having watched PBS at least an hour
20 in the past -- in the previous month. And then it
21 goes on -- and then it goes into the main body of the
22 questionnaire.

1 The first part basically dealt with what
2 programming they had watched in the past month. We
3 had 20 questions -- 20 programs listed, ten of which
4 were music, ten of which were non-music. They were
5 randomly mixed so there's no indication as to what we
6 were particularly interested in.

7 They were asked their music programming --
8 what they had watched, and also any other music
9 programming they had watched in the previous month.
10 The third part of the questionnaire dealt with
11 subjective attitudes about the appeal and importance
12 of music on PBS stations -- on the particular PBS
13 station they were watching.

14 And then the last part was more general
15 dealing with whether they donated, their general
16 attitudes towards programming on PBS and standard type
17 of demographics -- age, marital status, income.

18 Q And again, the 750 people you surveyed
19 responded to all four parts of the questionnaire?

20 A The complete -- if they qualified for the
21 questionnaire, they were asked the entire
22 questionnaire.

1 Q Okay, would you please describe the
2 results of the survey of these 750 people?

3 A Oh, I should point out one other thing
4 also. In terms of the section where you had the
5 subjective questions, there were six items that they
6 were asked about in terms of the appeal and importance
7 of music on PBS, and these were randomized also so
8 that there would be no sequential bias in terms of how
9 people answered the questions.

10 Excuse me, what was the follow up?

11 Q I want you to describe the results of the
12 survey.

13 A The results of the survey -- well, the
14 best way to do it is, I guess -- I assume everyone has
15 a copy. If you could turn to page seven as I'm
16 fighting bifocals. I'll remove my glasses for this
17 part.

18 Basically, if you look at it, just to
19 highlight it on page seven, the second paragraph
20 indicates that it was almost universal approval of PBS
21 programming. People were satisfied, either very or
22 somewhat.

1 95.1% of them expressed satisfaction with
2 the majority of them very satisfied.

3 Then we have the section where they were
4 asked about 20 different programs. Of the ten music
5 programs, 70% of the respondents -- 70.1, to be exact,
6 said they had watched at least one or more of those
7 ten music programs in the past month.

8 When you added in any -- we also asked
9 them if they had watched any other music programs
10 because it wasn't a comprehensive list of all the
11 programs. That number went up to 74.1%.

12 On the next page, this is the section I
13 was just alluding to that dealt with the six kind of
14 subjective questions in terms of the appeal and
15 importance of PBS programming. And if you just look
16 at the list on the bottom of page eight there,
17 basically it shows the results.

18 Now these are listed in an order here --
19 just in sequential order from the highest to the
20 lowest responses, but they were actually asked in a
21 randomized way, so every respondent could have had it
22 different order conceivably.

1 And just -- so for the statement "I
2 consider music an important part of PBS's
3 programming," they had a four point scale to answer --
4 agree strongly, agree somewhat, disagree somewhat,
5 disagree strongly.

6 And as you can see, over three-quarters,
7 77.7%, said they agreed strongly -- agreed somewhat,
8 with the majority, 49.9% of that 77.7, saying agree
9 strongly. And so on PBS's music programming that
10 appeals to me, 76.7% agreed either strongly or
11 somewhat.

12 "I would be disappointed if PBS cut back
13 on music programming," about two-thirds -- exactly
14 two-thirds, 67.7, said so and so on.

15 That's -- you know, on the last page,
16 there are demographics and also a few findings that
17 indicated that the people who were more responsive to
18 the music programming tended to be more likely to be
19 a donator to the stations.

20 Q What do these results that you just
21 described tell you about the universal adult PBS
22 viewers in these particular markets?

1 A Well, it basically said -- I mean, it
2 basically, with a -- the findings here indicated that
3 there was -- music was apparently important to the PBS
4 viewers in these markets based on the findings.

5 And based on 750 interviews, we could say
6 we know to -- at the 95% degree of certainty that we
7 are 95% certain that the findings are within basically
8 about plus or minus -- anywhere from plus or minus two
9 to plus or minus four percent, depending on a
10 particular answer.

11 When you give an answer closer to 90% of
12 ten, the variation is even smaller. When you get an
13 answer around 50%, it's plus or minus four based on
14 the 750.

15 Q Okay. So, for example, if you turn to
16 page eight, "I consider music an important part of
17 PBS's programming."

18 A Okay, if you turn to page eight -- okay,
19 that would have -- I'm just looking at this here. Out
20 of 77%, that would be plus or minus three. So
21 basically what you would have is that the true figure
22 there -- with 95% degree of certainty, we could say

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1 the true figure there would have fallen somewhere
2 between 74.7 and 80.7, the plus or minus three around
3 that number.

4 Q And that would be if you took a census of
5 every adult PBS viewer in all those seven markets?

6 A Who had watched at least one -- using
7 these specifications we used, correct.

8 MR. SHORE: Okay, I have no further
9 questions.

10 CHAIRPERSON GRIFFITH: All right.
11 Mr. Kleinberg.

12 MR. KLEINBERG: No questions.

13 CHAIRPERSON GRIFFITH: All right.
14 Cross examine.

15 CROSS EXAMINATION

16 BY MR. STEIN:

17 Q Good afternoon, Mr. Bergstein.

18 I'd like to just start by discussing some
19 aspects of the design of the survey. First, it's
20 correct that you limited the survey only to what you
21 term seven of the top ten largest PBS revenue
22 generating markets, correct?

1 A Correct.

2 Q Now, did you understand at the time you
3 conducted this survey that in fact there are 350 PBS
4 stations serving about 99% of the country?

5 A I understood there were more than --
6 certainly more than ten. I don't know if I recall the
7 exact number.

8 Q But you understood that they were
9 distributed throughout the United States?

10 A Correct.

11 Q Okay. And that most of the stations, in
12 fact, serve markets which are much smaller than, for
13 example, New York, San Francisco or Boston, which were
14 included in your survey?

15 A I would assume they are because these were
16 seven of the ten largest, so they would have to be
17 smaller.

18 Q Okay. And yet you elected not to randomly
19 select the stations which would be surveyed?

20 A Randomly select -- no, we were asked to do
21 a survey of the largest markets. That's was what we
22 were asked to do and that's what we did.

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1 Q I see. So, in other words, White & Case
2 instructed you as to which stations should be
3 surveyed?

4 A They asked us to do a study of the ten
5 largest markets, and were able to get information on
6 the programming from seven of them in order -- at the
7 time of doing the study. So we -- the seven just
8 basically came at random based on what we -- we had
9 hoped to get all ten.

10 Q When you say random though, you mean that
11 White & Case instructed you to look at only the top
12 ten largest?

13 A Not when I said random, no.

14 They asked me to do a study of the largest
15 markets, correct.

16 Q Okay. Did I understand you to say that,
17 in fact, there were three markets which you attempted
18 to survey but couldn't get data on?

19 A We did not have the information on -- we
20 did not have the programming information. The first
21 question there that I indicated, we asked them about
22 20 programs. We did not have the programming

1 information from those markets of the 20 -- in order
2 to build that question.

3 So in order to do the survey in the time
4 in which we did it, since we were asking about the
5 previous month and we wanted to do it, you could not
6 wait too long in order to do it or recall could become
7 a problem.

8 Q Did you rely upon White & Case to provide
9 you with the programming information?

10 A Yes.

11 Q So it was their failure to provide you
12 with programming information for these three markets
13 which caused you to eliminate them from the survey?

14 A Well, we didn't have the information.
15 Exactly, we didn't have the information.

16 Q But you didn't independently seek to
17 obtain it; you were --

18 A No, because we didn't have the
19 capabilities in the time period to start -- to get
20 that information.

21 Q You didn't -- I'm sorry.

22 A To get all the listings of all the

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1 markets. It was easier for White & Case to get it for
2 us. Which is typical.

3 I mean, a client -- I mean, it's
4 traditional, basically, if you're doing a survey of a
5 particular type of industry and a client is associated
6 with that industry, and you need a certain type of
7 information particular to that industry for the client
8 to provide it for you rather than you do a lot of
9 legwork that's unnecessary.

10 Q It's my understanding that the information
11 which you required was essentially a TV guide listing
12 the programs that were played during the month,
13 correct?

14 A It was -- no, it wasn't a TV guide because
15 you needed something for the entire month. You needed
16 every single listing for -- we used the month of
17 August of '97.

18 Q So you would have needed four TV guides or
19 something reflecting the programming that aired in the
20 entire month?

21 A Or something along those lines. Or any
22 kind of listing that provided all the programming so

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1 that we can draft -- so that we could draw 20 programs
2 to ask about.

3 Q And you were unable to independently
4 obtain TV guides?

5 A We didn't attempt to do it independently
6 because White & Case said they would try to get us all
7 they could get us.

8 Q And then White & Case was unable to obtain
9 TV guides for three of the top ten markets in the
10 country for the month of August?

11 A I don't know what they were -- all I know
12 is what they -- they were able to provide us with
13 seven -- with the information on seven of the markets.

14 Q I noticed -- in connection with your
15 interaction with White & Case, I notice that, at page
16 five of your testimony, you state that the survey was
17 approved by White & Case, correct?

18 A Correct.

19 Q Is it your usual methodology to obtain
20 approval from a client on whose behalf you're
21 designing the survey?

22 A Always.

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1 We design the survey and then we run it by
2 the client. And if a client has any objections to a
3 -- I mean, the client's paying for the survey.

4 Q In most of the instances where you're
5 designing the survey, are you doing it for purposes of
6 litigation?

7 A Only sometimes.

8 Q In those cases, is it typical for you to
9 obtain approval?

10 A Yes.

11 Q Okay. Is it your experience that that's
12 standard practice when designing surveys?

13 A We design the questions, Audits and
14 Surveys.

15 Q Let me just finish the question.

16 A Sorry.

17 Q Is it your experience that, in connection
18 with the preparation of surveys to be used in
19 litigation, that you obtain the approval of the party
20 on whose behalf you're seeking to do the survey?

21 A Yes.

22 Q Okay. Who at White & Case approved the

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1 survey?

2 A Chris Shore.

3 Q Can you describe the process through which
4 you designed this survey, including Mr. Shore's
5 approval?

6 A Yes, basically he told me that -- he
7 outlined what type of information we wanted to gather
8 in the survey, which was viewership of programming, as
9 well as attitudes about music on PBS, and asked me to
10 design a series of questions that would obtain that
11 information.

12 And, you know, I designed it and actually
13 pointed out -- designed it in a way to keep it as
14 objective as possible in terms of the randomization of
15 questions, the mixing of music with non-music so as
16 not to give any indication in advance to the
17 respondent that we were particularly interested in any
18 one objective.

19 Q Putting aside for the moment randomizing
20 the order --

21 A Right.

22 Q -- of the questions, --

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1 A Right.

2 Q -- did White & Case make suggestions as to
3 what the music related questions ought to be?

4 A No, actually we pulled out the music
5 questions. My project director, as far as I could
6 recall, because she was handling the day to day -- she
7 pulled out the music questions looking at -- trying to
8 find music programming that kind of was programming
9 across the month, if possible, like special programs
10 that appeared across the month.

11 And then we did run it by them to make
12 sure, in fact, what we indicated was music and non-
13 music was in fact music and non-music because we
14 weren't experts on all the programming.

15 What we had was a listing of the name of
16 the program, so we had to make judgement calls. And
17 then we had to have it approved that in fact we did
18 have ten of each type.

19 Q What was the name of the project director
20 who you mentioned?

21 A Lisa Scuderi. She's my project director.

22 Q Do you know if she had conversations with

1 Mr. Shore concerning the design of the survey?

2 A I assume she had conversations with him
3 because she's the one who received all the information
4 from him and sent back the questionnaire to him to be
5 sure we had ten music and ten non-music programs
6 listed.

7 Q Do you know if she received input from Mr.
8 Shore as to what the wording of the questions that
9 were asked concerning people's perception of public
10 television music programming --

11 A Actually, those were questions I designed.

12 Q Did you have discussions with Mr. Shore
13 about those questions?

14 A I probably did; but if there was any
15 change, it was minimal because I remember he thought
16 the questions were very well worded.

17 JUDGE DREYFUS: While we're at a pause
18 here, is anyone going to introduce the survey as an
19 exhibit?

20 MR. SHORE: It is attached as an appendix
21 to the written testimony.

22 JUDGE DREYFUS: Oh, I'm sorry.

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1 MR. SHORE: That's exactly what the survey
2 is.

3 JUDGE DREYFUS: Okay, yes.

4 MR. STEIN: Let me just clarify that
5 that's a survey report. That does not purport to be
6 all of the underlying data or reflect the individual
7 responses of the people who responded to the survey.

8 MR. SHORE: Although all that data was
9 provided to Public Broadcasting.

10 MR. STEIN: Or the questionnaire, by the
11 way, which was used.

12 MR. SHORE: And the questionnaire was also
13 provided to Public Broadcasting.

14 BY MR. STEIN:

15 Q Now I gather that one purpose of the study
16 was to determine levels of music programming
17 viewership on PBS stations?

18 A Uh-huh.

19 Q Okay. And so you attempted to survey
20 people who watched public television in these seven
21 largest markets, correct?

22 A Yes.

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1 Q Okay. Now I assume you're familiar with
2 the fact that public televisions air a significant
3 number of programs directed towards children such as
4 Sesame Street, for example?

5 A Uh-huh.

6 Q And that, accordingly, children comprise
7 a portion of the viewership of public television?

8 A I would say so.

9 Q Okay. And you're further aware, I assume,
10 that public television programs are broadcast as part
11 of educational programs to elementary schools,
12 secondary schools, colleges, etc.?

13 A If you say so. I mean, I'm not aware of
14 what programming goes into elementary schools per se.

15 Q But I assume we can agree that there is a
16 portion of public television's audience that is
17 comprised of persons under the age of 18?

18 A I'm sure there -- certainly.

19 Q Okay. And that such persons were
20 certainly included within the seven largest markets
21 that you surveyed?

22 A They weren't included within the survey,

1 but they live in the market, sure.

2 Q Right. And some of them watch public
3 television?

4 A I'm sure they do.

5 Q Okay. Did you undertake any research to
6 determine how much of public television's viewership
7 in those markets consisted of persons under 18?

8 A That wasn't our mission.

9 Q Okay. Nonetheless, you excluded all
10 persons under 18 from this study?

11 A This was a study of adults, right. I
12 mean, sometimes you do a study of children, sometimes
13 you do a study of adults, sometimes you do a study of
14 both. This was a study of adults.

15 Q And we elected not to -- you elected,
16 under instruction from White & Case, not to look at
17 the viewpoints of people under 18 with respect to
18 music programming?

19 A They were interested in adults for this
20 study, correct.

21 Q Okay, now I notice you mention that the
22 survey was conducted in September, correct?

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1 A Uh-huh.

2 Q And interviewees were asked about the
3 viewing of public television in these seven markets
4 during the month of August, correct?

5 A For the previous month, previous complete
6 month, right, --

7 Q Okay.

8 A -- which was August, right.

9 Q And White & Case and you designed a survey
10 which focused your questions on music programs which
11 occurred during that prior month?

12 A Well, actually it didn't focus just on
13 music programs. The question about programs had both
14 music and non-music programs mixed together, like I
15 said, in a randomized order.

16 Q Right, but you were asking people have you
17 seen this program in the last month?

18 A Correct, and we read them the list of 20.

19 Q And then of the programs in that list were
20 music programs?

21 A Correct.

22 Q And you then draw conclusions about how

1 many times the person said I happened to watch a music
2 program in the last month?

3 A We actually had data. In other words, the
4 people answered -- it was the number of people
5 answered yes to at least one program, one of the ten
6 music programs in the previous month. That's where
7 the 70% figure came in.

8 Q Okay. And you only asked them, by the
9 way, about programs which were airing in prime time
10 during the month of August?

11 A Prime time and Sunday, during the day.

12 Q Okay. Now was it your understanding that
13 the month of August -- that the programming fare
14 airing on these seven stations during the month of
15 August was typical in terms of the programming fare
16 that's usually on public television?

17 A I don't know one way or the other.

18 Q Did you assume that it was typical?

19 A I don't recall if I did or not because
20 it's really irrelevant to what my findings are in
21 terms of how I express my findings.

22 Q You're just reporting the facts on what

1 people told you?

2 A I'm reporting the facts of what we found
3 for the month of August, right.

4 Q But nobody at White & Case told you that
5 it wasn't a typical month, did they?

6 A Not that I can recall.

7 Q Okay. Did anyone tell you, for example,
8 that every single one of the stations that you
9 surveyed was conducting a pledge drive during the
10 month of August?

11 A I don't recall that.

12 Q Okay. Are you aware that the mix of
13 programming that airs during pledge drives is not the
14 typical mix of programming that appears on public
15 television stations?

16 A I don't know. In terms of mix, I have no
17 idea of knowing whether the mix -- by mix, you mean
18 music versus non-music --

19 Q Yes.

20 A -- is typical or not typical. I have no
21 idea. I just know they have different shows.

22 Q Well, if the mix was not typical during

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1 that month, wouldn't that skew the results of the
2 survey?

3 A It wouldn't skew the results of the survey
4 because the survey is a survey of the month of -- of
5 what people reported for the month of August. And the
6 program -- these are the programs that were listed for
7 the month of August, so it wouldn't skew that.

8 Q Okay, so it's an accurate representation
9 of August. But if August is not a representative
10 month, it's not necessarily an accurate reflection of
11 the typical month?

12 A That would be true for that particular
13 question. The other questions dealing on attitudes
14 about music had nothing to do with the month of
15 August.

16 Q Okay, but just to be clear, in terms of
17 the conclusions you will reach -- I believe it's at
18 page -- excuse me -- seven, going over onto eight of
19 your testimony where you talk about the average number
20 of people who say I saw a music program in that month,
21 --

22 A Right, I say during the month of August --

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1 Q Right.

2 A -- at the beginning of the paragraph.

3 Q And if that month was not typical, then
4 those numbers would not necessarily be representative
5 of what happens in an average month on public
6 television, correct?

7 A Not necessarily. I couldn't say.

8 Q Okay. Just a point of clarification that,
9 in asking the questions about specific programs which
10 aired, you elected to include ten music programs and
11 ten non-music programs, correct?

12 A Right.

13 Q And who decided on that ratio?

14 A I think it was done in consultation with
15 the client in terms of how many -- how many we wanted
16 to ask and how many of each type.

17 Q Okay. But that's --

18 A I can't remember the exact --

19 Q But you're not saying that, in fact, half
20 of the programs which aired in public television in
21 those markets during that month were music programs?

22 A Not at all.

1 For that matter, actually, the finding you
2 would say would be a conservative finding because we
3 didn't ask about every single music program that aired
4 in the month of August. If we asked every single one,
5 you may have gotten a figure of 90% conceivably.

6 Q It might have been lower too, correct?

7 A Couldn't have been lower because they
8 answered yes to the programs we asked about. These
9 programs all aired -- we didn't ask about a lot of
10 programs.

11 Q Well, if you --

12 A It could not have been lower. It could
13 only have been higher.

14 Q I assume --

15 A Do you see what I'm saying?

16 Q I'm not sure.

17 A Well, let me clarify.

18 If we asked about ten programs and we got
19 a finding of 70% saw at least one of those ten
20 programs, and there were another 30 programs that we
21 didn't ask about, my guess is that, of the 30% who
22 didn't watch any of those ten, some of them would have

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1 watched some of the other 30 that we didn't even ask
2 about.

3 So it could not go below the 70 because
4 those were programs that aired and everyone watched at
5 least one of them. It could only go up from that. So
6 it's a conservative figure.

7 Q But the survey also could have been
8 formatted to ask for five music programs and 15 non-
9 music programs and the number might have gone down,
10 right?

11 A It would have been that much more
12 conservative figure.

13 Q Right.

14 A If you asked about one, you would have had
15 maybe only 20% having said or 10%.

16 Q And you have no idea if the number of
17 music programs versus non-music programs which you
18 asked about was reflective of the actual program mix
19 which aired on those stations?

20 A No, I don't.

21 Q Okay.

22 A Ideally, you'd like to ask about every

1 program that's on, but you can't do that in the course
2 of a survey.

3 Q Now with respect to the questions in which
4 you posed -- you asked people whether they agreed,
5 strongly disagreed or with -- for their perceptions,
6 those questions were focused exclusively on music
7 programming, correct?

8 A Correct.

9 Q You did not undertake to examine how their
10 perceptions concerning music programming compared with
11 their perceptions concerning other types of
12 programming on public television?

13 A That's correct.

14 Q So you can't reach any conclusions on a
15 comparative basis with respect to whether music
16 programming is more or less valued than other types of
17 programming on public television?

18 A That's correct.

19 Q So just as an example, it's quite possible
20 for -- and I'm just looking at page eight -- that the
21 third question in which you ask about people being
22 disappointed if PBS were to cut back on music

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1 programming, it's quite possible that people would
2 feel more strongly about cut backs on other types of
3 programming, correct?

4 A It's possible.

5 Q Your survey doesn't address that issue at
6 all?

7 A No, I can't speak to that.

8 Q And a similar conclusion would also be
9 true with respect to the statements you make about the
10 likelihood of donations based upon your survey, is
11 that correct?

12 A Could you clarify what --

13 MR. SHORE: Objection to form.

14 BY MR. STEIN:

15 Q Let me turn you to page nine of your
16 survey where you reach certain conclusions about the
17 fact that a person who watched one or more music
18 programs was "twice as likely as those who had watched
19 none to donate."

20 A Right.

21 Q It's quite possible that that relationship
22 holds true or more true with respect to the watching

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1 of other types of programs, correct?

2 A Well, these people did watch other types
3 of programs. In other words, the people who did not
4 watch one or more music programs did watch programming
5 on PBS. They just didn't watch music programs.

6 If you're saying about a specific type --
7 if, you know, you categorized it, I can't say. But
8 the people who fall into the lower number here are PBS
9 viewers that didn't watch music.

10 Q Let me ask the question another way --

11 A They watched other programs.

12 Q -- which is, it's quite possible that if
13 you did a study to look at people who watched news
14 programming on public television, you might find that
15 the number who watched one or more news programs were
16 twice as likely or perhaps three times as likely to
17 donate, correct?

18 A It's possible.

19 Q Your survey doesn't address that issue at
20 all?

21 A No, there's no information here on that.
22 We didn't ask that question.

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1 Q Just to clarify, the survey was focused
2 exclusively on programming in August of 1997 and
3 viewer perceptions as of September 1997, correct?

4 A Not exclusively. It was -- the people
5 were screened in as people who had watched at least an
6 hour of the previous month. And one question, the
7 question of the ten programs, focused on August. All
8 the other questions did not focus on August.

9 Q But their -- all of the responses reflect
10 -- putting aside the questions about specific
11 programs, all of their questions about the -- all of
12 the questions about the perception they have of music
13 programming reflected their perceptions as of
14 September 1997, correct?

15 A As of -- what do you mean by "as of
16 September" -- that's when the study was conducted.

17 Q Yes.

18 A At that time, when we surveyed those
19 people, these were their attitudes, right.

20 Q The survey, therefore, permits no
21 conclusion as to how the level of what you term music
22 programming viewership on PBS stations has changed

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1 over time, correct?

2 A You would have to be doing a number of
3 studies over time for that. No, this doesn't address
4 the issue of changing over time. It doesn't address
5 the issue of changing attitudes.

6 Q Permits us to draw no conclusion as to
7 whether or not that -- the degree to which music
8 programming viewership over PBS has declined over
9 time, correct?

10 A That's correct also, yes.

11 Q Okay. And similarly, the survey doesn't
12 allow us to draw any conclusion as to how viewers'
13 enjoyment of music programming on PBS has changed over
14 time, correct?

15 A Anything relating to change over time is
16 not addressed by this study because it's a study that
17 takes place one point in time.

18 Q Okay.

19 A It's attitudes of the people when they
20 were surveyed.

21 Q You understand that this is a proceeding
22 for the purpose of setting the fees to be paid by

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1 public television and radio stations for the right to
2 make performances of ASCAP and BMI's music, correct?

3 A That's my understanding.

4 Q Nothing in your survey provides the Court
5 with a methodology for determining the fee in this
6 case, does it?

7 A No.

8 Q Okay.

9 A As far as I know of, nothing in it, unless
10 you guys find something in it that does.

11 Q And by definition, I assume none of the
12 questions which you asked addressed in any manner
13 setting an individual fee for ASCAP in this case?

14 A No.

15 Q None of your questions, in fact, dealt
16 with the importance of ASCAP music whatsoever,
17 correct?

18 A Well, it dealt with music. It did --
19 nothing said ASCAP in it. I mean, I don't know if
20 some of the programs that were asked about were ASCAP
21 or not. I mean, that's beyond -- I don't know.

22 But there were no questions that had ASCAP

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1 in the wording.

2 Q What were you paid to conduct this survey?

3 A I think it was about \$30,000
4 approximately. I don't have the figure in front of
5 me. We do a lot of surveys, so I don't remember.

6 MR. STEIN: I have no further questions.

7 CHAIRPERSON GRIFFITH: All right, anything
8 further?

9 MR. SHORE: Just a few questions.

10 REDIRECT EXAMINATION

11 BY MR. SHORE:

12 Q Just out of curiosity now, what would it
13 have cost us to have surveyed all 350 markets -- same
14 survey?

15 A At the same level?

16 Q Yes.

17 A Well, what's that, about 50 times seven.
18 If we took it literally, it would have probably been
19 -- well, certainly over a million dollars, I would
20 imagine.

21 Q Now if you turn to page eight, again the
22 questions, for example, "I consider music an important

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1 part of PBS's programming," and 77% of the people
2 agreed, there seem to have been some questions -- I
3 just want to clarify.

4 I didn't write any of these questions, did
5 I?

6 A No, I did.

7 Q And if I had carried in I consider music
8 an important part of PBS's programming or I prefer
9 music more to getting a root canal, you would probably
10 have said don't put that one in, Chris, right?

11 A I think so.

12 Q Okay. And so I wasn't asking you to load
13 any of the questions?

14 A No, actually you just asked me -- you
15 know, to the best of my memory, you just asked me to
16 develop some questions that would relate to music
17 programming on PBS and how it might be important or
18 appeal to people. And I just used my skills,
19 hopefully, in developing questions that were
20 meaningful.

21 Q And I didn't cut out any of your
22 questions?

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1 A No.

2 Q And I didn't -- you didn't throw out any
3 data? All the data that you gathered from the 750
4 people came into --

5 A Absolutely.

6 Q -- came in or was handed over to Public
7 Broadcasting?

8 A Absolutely. We did only 750 interviews,
9 and there were all in the report.

10 MR. SHORE: No further questions.

11 CHAIRPERSON GRIFFITH: All right.

12 MR. STEIN: Just one question on recross.

13 RECROSS EXAMINATION

14 BY MR. STEIN:

15 Q The survey wouldn't have cost any more to
16 perform if you had randomly selected ten stations as
17 opposed to taking only the ten largest, correct?

18 A If we had randomly selected ten stations?
19 If it was the same size, it would have cost
20 essentially the same, right.

21 Q Okay.

22 CHAIRPERSON GRIFFITH: All right.

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1 Judge Dreyfus.

2 JUDGE DREYFUS: With respect to page eight
3 and the questions listed there, it seems to me that
4 each question, if the answer is yes, that puts the
5 person in the group.

6 THE WITNESS: If the --

7 JUDGE DREYFUS: You know, agree strongly.

8 THE WITNESS: If they said -- they had a
9 four point scale, two agree -- evenly balanced, agree
10 strongly, agree somewhat, disagree somewhat, disagree
11 strongly. If they said agree to either one, it's in
12 the first column. If they said agree strongly, it's
13 in the second column.

14 JUDGE DREYFUS: Okay, but, for example,
15 the third question could have been written "I would be
16 happy if PBS cut back on its music programming," --

17 THE WITNESS: It could have been asked
18 that way.

19 JUDGE DREYFUS: -- in which case the -- if
20 they had disagreed strongly, that would put them --

21 THE WITNESS: It would be the opposite and
22 it would be presented --

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1 JUDGE DREYFUS: Yes.

2 THE WITNESS: -- it would be the opposite
3 thrust. Therefore, the disagree strongly would be the
4 equivalent of the agree strongly on that one.

5 JUDGE DREYFUS: Yes, which your --

6 THE WITNESS: I mean, if -- for this type
7 of answer, right.

8 JUDGE DREYFUS: That's right.

9 And so I guess my question is, why weren't
10 some of the questions couched in the reverse?

11 THE WITNESS: In the negative?

12 JUDGE DREYFUS: Yes.

13 THE WITNESS: I guess it was based -- and
14 I'm just going back in time basically -- I mean, it's
15 very often we will do questionnaires just this way.
16 In other words, the mission basically was to develop
17 questions to see whether or not the programming
18 appealed to people and was important to people.

19 So my thinking, in just developing, was to
20 come up with a series of statements reflecting that
21 and then to see to what degree people agreed or
22 disagreed.

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1 JUDGE DREYFUS: Well, wouldn't it more
2 accurately reflect the results by having some
3 questions couched in the reverse?

4 THE WITNESS: I wouldn't say it would
5 necessarily, no. Sometimes it causes --

6 JUDGE DREYFUS: It gets them -- the idea
7 is that it gets them to think more about the
8 particular --

9 THE WITNESS: You can make an argument
10 both ways, I guess, because there is a case to be made
11 too that sometimes when you mix negatives and
12 positives together -- remember, this is over the
13 telephone -- it gets confusing to a respondent at
14 times in terms of they're agreeing, but this is --
15 they're agreeing to a negative.

16 If you're agreeing to a negative -- it
17 sometimes does cause some problems. I mean, it's --
18 you know, you just make a call on it at times. And
19 this is how I designed it.

20 I mean, you will have questionnaires that
21 mix things, you have questionnaires that state all
22 negatives, you'll have questionnaires that state all

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1 positives. There's no one rule that really is in
2 place on something like that.

3 JUDGE DREYFUS: Okay.

4 CHAIRPERSON GRIFFITH: All right.

5 Sir, you may step down. You are free to
6 go.

7 Thank you very, very much.

8 THE WITNESS: Thank you.

9 (The witness was excused.)

10 CHAIRPERSON GRIFFITH: Ladies and
11 gentlemen, I am happy to announce we are adjourned
12 until tomorrow morning at 9:30.

13 MR. SCHAEFFER: Your Honor, we'll try and
14 see what we can agree on.

15 CHAIRPERSON GRIFFITH: Okay, fine.

16 Thank you.

17 (Whereupon, the proceedings were adjourned
18 at 5:37 p.m., to be reconvened at 9:30 a.m., March 13,
19 1998.)

20

21

22

CERTIFICATE

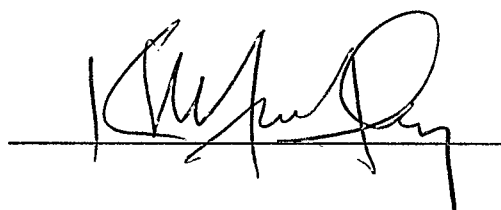
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Place: Washington, DC

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